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No. ..-...

IN THE

Supreme Court of the United States

October Term, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

OR IN THE ALTERNATIVE

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

JURISDICTIONAL STATEMENT.

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Questions Presented.

1. Did the United States District Court have subject matter jurisdiction over the Franchise Tax Board's Complaint for Failure to Honor Garnishment and for Declaratory Relief which was originally filed in state court and removed by Appellee to federal court where the Franchise Tax Board's causes of action were based solely on State law and any federal question was raised only as a defense?

2. Is California prohibited by the doctrine of preemption from collecting delinquent personal income taxes from a vacation trust regulated by the Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* (commonly known as ERISA), notwithstanding the fact that

   a. The California statute which authorizes said collection (Calif. Revenue & Taxation Code § 18817) neither conflicts with any specific provision of ERISA nor interferes with the Congressionally stated purpose of ERISA;

   b. Congress did not specifically indicate that ERISA was intended to prempt State levy statutes such as the California statute?

3. If the provisions of ERISA were intended to preempt State levy statutes such as the California statute, is this unconstitutional as a violation of the Tenth Amendment because it interferes with the sovereign power of the State of California to assess and uniformly collect its taxes?

Parties to This Action.

The parties to this action are:

1. The Franchise Tax Board of the State of California.
2. The Construction Laborers Vacation Trust for Southern California.
3. Edward Ashton.
4. Al Atwood.
5. Gary Bronneck.
6. John R. Clarke.
7. R.C. Gallyon
8. Richard Greenberg.
9. Foger Jaska.
10. William Middleton.
11. George Mattocks.
12. William R. McClain.
13. Nick Orsura.
14. Joe Rivera.
15. Ray M. Wilson.
16. James Keyes.

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FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,
Appellees.

JURISDICTIONAL STATEMENT.

Appellant the Franchise Tax Board of the State of California appeals from the Opinion of the United States Court of Appeals for the Ninth Circuit entered June 22, 1982, or in the alternative respectfully prays that a Writ of Certiorari issue to review that Opinion, which holds that California Revenue and Taxation Code section 18817 is preempted by the Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* (hereinafter ERISA) insofar as Revenue and Taxation Code section 18817 allows the Franchise Tax Board to levy on an employee welfare benefit plan (in this case a vacation trust) regulated by ERISA to collect a beneficiary's delinquent taxes.

Appellant the Franchise Tax Board submits this statement to demonstrate that the Supreme Court of the United States has jurisdiction of this appeal, that the United States District Court did not have subject matter jurisdiction of this action, and that substantial questions are presented.

Opinions Below.

The Opinion of the Court of Appeals (Appendix A, *infra*) was filed on June 22, 1982 and is reported at 679 F.2d 1307; that Court's Order denying Appellant's Petition For Rehearing (Appendix D, *infra*) was filed on July 21, 1982. The Judgment of the United States District Court for the Central District of California (Appendix B, *infra*) was entered on December 4, 1980. The Findings of Fact and Conclusions of Law for the United States District Court for the Central District of California (Appendix C, *infra*) were entered on December 4, 1980.

Jurisdiction.

This suit was originally brought in the Superior Court of the State of California for the County of Los Angeles by the Appellant, the Franchise Tax Board of the State of California.

Appellees, the Trustees of the Construction Laborers Vacation Trust Fund For Southern California, filed a Petition For Removal which alleged that the federal court had original jurisdiction over this proceeding pursuant to sections 403(c)(1) and 514 of ERISA (29 U.S.C. §§ 1103, 1104, 1144.) Appellees alleged that the action was properly removed to federal court pursuant to 28 U.S.C. § 1441. The case was removed to federal court. The Franchise Tax Board filed a Motion To Remand pursuant to 28 U.S.C. § 1447(c) on the grounds that the United States District Court for the Central District of California did not have jurisdiction of the subject matter of the action because the suit did not involve a claim or right arising under the Constitution, treaties or laws of the United States and on the grounds that there was no other basis for the court's jurisdiction since the Franchise Tax Board's cause of action arose solely under California law as construed and applied by the courts of the State of California.

The United States District Court for the Central District of California denied the Motion To Remand.

The Opinion of the Court of Appeals for the Ninth Circuit was filed on June 22, 1982. A timely Petition For Rehearing was filed on July 6, 1982. The Petition For Rehearing was denied on July 21, 1982.

Appellant filed a Notice of Appeal to the Supreme Court of the United States from the Opinion on September 17, 1982, with the clerk, United States Court of Appeals for the Ninth Circuit. (Appendix F, *infra*.)

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(2).

Such a direct appeal is allowed where a Court of Appeals holds a State statute to be invalid as repugnant to the Constitution, treaties or laws of the United States. Herein the Court of Appeals for the Ninth Circuit held that California Revenue and Taxation Code section 18817 was preempted by ERISA insofar as it allowed the Franchise Tax Board to levy on ERISA — regulated vacation trusts.

This Jurisdictional Statement is filed timely with this Court under the provisions of 28 U.S.C. § 2101(c).

Constitutional Provisions and Statutes Involved.

California Revenue and Taxation Code section 18817 provides in pertinent part:

> "The Franchise Tax Board may . . . require any employer, person, . . . having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer . . . to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer . . . and to transmit the amount withheld to the Franchise Tax Board at such times as it may designate."

ERISA section 3, 29 U.S.C. § 1002 provides in pertinent part:

". . . For purposes of this title:

"(1) The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or *vacation* benefits, . . . (Emphasis added.)

"(2) The terms 'employee pension benefit plan' and 'pension plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program —

"(A) provides retirement income to employees,

". . . .

"(3) The term 'employee benefit plan' or 'plan' means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

Thus, a vacation trust is defined as an "employee benefit plan," an "employee welfare benefit plan" or a "welfare plan" but not as a "pension plan."

ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) provides as follows: "Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

ERISA section 514(a), 29 U.S.C. § 1144(a) provides in pertinent part:

> "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)."

ERISA section 514(c)(2), 29 U.S.C. § 1144(c)(2) provides in pertinent part:

> "The term 'State' includes a State . . . which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title."

Statement of the Case.

Appellees, the Trustees of the Construction Laborers Vacation Trust, hold vacation trust fund benefits on behalf of certain beneficiaries who are employed in the construction industry. These vacation trust fund benefits are governed by the provisions of ERISA. Appellant, the Franchise Tax Board, served Notices to Withhold Personal Income Taxes pursuant to California Revenue and Taxation Code sections 18817 and 18818 on the Trustees in order to collect the unpaid personal income tax liabilities of these certain beneficiaries from the vacation trust fund benefits held by the Trustees for those beneficiaries.[1] The Trustees refused to honor said Notices to Withhold on the grounds that Revenue and Taxation Code section 18817 was preempted by ERISA, specifically ERISA section 514, 29 U.S.C. § 1144.

Appellant, Franchise Tax Board, filed an action on June 13, 1980 for failure to honor garnishment and for declaratory relief in the Superior Court of the State of California for the County of Los Angeles.

Appellees removed the case to the United States District Court for the Central District of California on June 26, 1980.

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[1]The sole issue in this case concerns ERISA-regulated vacation benefits. The Board has not levied on pension benefits.

On July 8, 1980, appellees filed a Motion to Dismiss on the ground that the Franchise Tax Board failed to state a claim upon which relief could be granted in that Revenue and Taxation Code section 18817 as the Franchise Tax Board sought to apply it in this case was preempted by ERISA, specifically ERISA section 514, 29 U.S.C. § 1144.

On July 22, 1982, the Franchise Tax Board filed its opposition to the motion to dismiss. The parties agreed that the motion to dismiss and opposition thereto could be treated as cross motions for summary judgment.

The United States District Court made its order granting summary judgment for the Franchise Tax Board. On December 4, 1980, Findings of Fact and Conclusions of Law (Appendix C, *infra*) and Judgment (Appendix B, *infra*) were entered.

On December 16, 1980, the Construction Laborers Vacation Trust Fund, *et al.*, filed its Notice of Appeal to the Court of Appeals for the Ninth Circuit.

The case was argued before a panel of the United States Court of Appeals for the Ninth Circuit on February 2, 1982. On June 22, 1982, the panel issued an opinion (one judge dissenting) reversing the United States District Court's granting of summary judgment for the Franchise Tax Board.

A Petition for Rehearing was timely filed. The panel issued an order on July 21, 1982 denying the Petition for Rehearing.

The Court of Appeals for the Ninth Circuit found that although vacation trusts are not specifically protected from creditors' claims under ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) as are pension trusts, they are impliedly covered, and further that Revenue and Taxation Code section 18817 is preempted by ERISA section 514(a), 29 U.S.C. § 1144(a) as a State law relating to an employee benefit plan insofar as it is used to levy against a vacation trust to satisfy a beneficiary's delinquent taxes.

The opinion of the Ninth Circuit erroneously allows certain individuals to insulate their yearly vacation pay from California tax levy.

The Court of Appeals relied for its opinion on the case of *Alessi v. Raybestos-Manhatten, Inc.* (1981) 451 U.S. 504 decided by this Court. The Franchise Tax Board respectfully submits that this Court should clarify the *Alessi* opinion by stating that the opinion does not prohibit a State from levying on ERISA vacation trust funds in order to collect taxes.

The Franchise Tax Board also submits that this Court should clarify the scope of ERISA's anti-alienation and preemption sections and find that Congress did not intend to treat vacation benefits the same as pension benefits and did not intend to interfere with the historic police power of the States to collect delinquent taxes.

In addition, the Franchise Tax Board submits there is a serious question regarding whether the United States District Court had subject matter jurisdiction of this action since the Franchise Tax Board's causes of action were based solely on State law and any federal questions were raised only as a defense.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

I.
INTRODUCTORY STATEMENT.

The Ninth Circuit has held that California's income tax levy statute, Revenue and Taxation Code section 18817, has been preempted and thus California is prohibited from levying on ERISA-covered *vacation* trust benefits to collect delinquent taxes.

The Ninth Circuit opinion is clearly erroneous because Congress clearly did not intend for workers covered under ERISA vacation plans to finance their annual vacation before they pay their taxes.

This is the first time insofar as the Franchise Tax Board is aware, that any court has prohibited a levy or garnishment on an ERISA-regulated vacation trust. Before this case, the only other reported case regarding vacation trusts was from the Supreme Court of Missouri. In *Electrical Workers v. IBEW-NECA Holiday Trust* (1979) 583 S.W.2d 154, the Missouri Supreme Court allowed a credit union to garnish a vacation trust. This decision of the Ninth Circuit conflicts with the *Electrical Workers* decision and is erroneous because Congress has not specifically prohibited this levy, the levy would not interfere with the stated goals of Congress in creating ERISA, the California levy statute does not directly or indirectly regulate the ERISA-covered vacation trusts, and the decision interferes with the historic sovereign power of the State of California to assess and collect taxes.

At the outset, it must be emphasized that this case concerns vacation benefits only. The Franchise Tax Board has not attempted to levy on pension benefits. This is an important distinction because when Congress created ERISA, it was primarily for the purpose of protecting pension trusts from mismanagement and various abuses of the past. Congress realized the importance of assuring that American workers could rely on their pension when they retired. The

Franchise Tax Board submits that vacation pay is not in the same category as a lifetime pension and that Congress did not intend vacation pay to receive the same protection as a pension plan.[2] This is easily demonstrated by an analysis of ERISA itself which indicates that all sections of ERISA apply to pension trusts while only some apply to vacation trusts.

The Congressional findings and declaration of policy with regard to ERISA are found at ERISA section 2, 29 U.S.C. § 1001. An analysis of these findings shows that the Franchise Tax Board's levy on vacation benefits will not interfere with these stated purposes of ERISA.

The Congressional findings indicate that Congress was concerned with the financial security of participants and their beneficiaries and in order to insure this security, Congress legislated strict controls with respect to the establishment, operation and administration of ERISA plans. The Congressional findings specifically refer to retirement benefits and the need for vesting provisions. The findings do not refer specifically to vacation benefits.

This Court has stated that ERISA is a comprehensive statute "which Congress adopted after careful study of private retirement plans." *Alessi v. Raybestos-Manhatten, Inc.* (1981) 451 U.S. at 510.

The issue is a substantial one which affects all States throughout the nation in their collection of taxes where a vacation trust governed by ERISA is involved. The Franchise Tax Board submits that this Court should note probable jurisdiction and allow full briefing and oral argument in order to settle this important question.

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[2]The dissenting judge in the Ninth Circuit opinion below stated that "In real world terms, the loss of one's pension is far more catastrophic than the loss of funds devoted to financing an annual vacation." *Franchise Tax Bd. Etc. v. Construction Laborers, Etc.* (9th Cir. 1982) 679 F.2d 1307, 1311.

In California alone, the Franchise Tax Board estimates that there are over 400,000 individuals working in various industries who are beneficiaries of vacation trusts. This Ninth Circuit opinion will preclude the State of California from levying on these vacation trusts to collect delinquent taxes.

With regard to the construction industry, the Franchise Tax Board is often unable to levy on the wages of construction workers because the workers are employed by multiple employers for various periods of time. In many cases, the vacation trust is the most feasible tax collection device available to the Franchise Tax Board.

The Ninth Circuit has relied on the general preemption section, ERISA section 514(a), 29 U.S.C. § 1144(a), and the recent case of *Alessi v. Raybestos-Manhatten, Inc., supra,* 451 U.S. 504, for its decision.

The Ninth Circuit also found that although vacation trusts were not specifically protected from creditor's claims, ERISA's purpose and the anti-alienation clause in ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) impliedly prohibited the Franchise Tax Board from levying on the vacation trust.

The Board seeks guidance from this Court as to the scope of ERISA's preemptive and anti-alienation sections especially concerning the sovereign police power of the State of California to levy on vacation trust funds to collect delinquent taxes.

The Board also seeks guidance as to whether the *Alessi* case which dealt with a state law that directly regulated a *pension* trust should be interpreted to preclude the Franchise Tax Board from levying on *vacation* trust funds.

The Ninth Circuit has extended *Alessi* in two important respects in the case at bar. First, this case deals with a vacation trust, not a pension trust as did *Alessi*. Second, this case deals with a State statute, Revenue and Taxation Code section 18817, which does not directly or indirectly

regulate an ERISA-covered vacation trust, contrary to the statute discussed in *Alessi*.

In *Alessi*, this Court noted that it was not deciding the outer limits of ERISA's preemption section. The Franchise Tax Board respectfully contends that this Court should now decide that the preemption section of ERISA is not limitless and that Congress did not intend to nor did it have the power to interfere with the sovereign police power of a State to assess and uniformly collect its taxes.

The Franchise Tax Board contends there is no direct conflict with ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1), because that section does not specifically prohibit the Franchise Tax Board from levying on vacation trusts. Furthermore, prohibition should not be implied which would infringe on the sovereign power of the State of California.

The Franchise Tax Board further contends that ERISA's preemption section, ERISA section 514(a), 29 U.S.C. § 1144(a) does not preempt Revenue and Taxation Code section 18817.

First, Revenue and Taxation Code section 18817 does not purport to regulate, directly or indirectly, the terms and conditions of the ERISA-covered vacation trusts.

Second, Congress has not totally occupied the field of vacation trusts. Although all of the provisions of ERISA apply to pension plans, by contrast, employee welfare benefit plans (vacation trusts) are only covered by the sections dealing with reporting, disclosure, fiduciary standards and administration. This indicates that Congress intended to regulate more fully in the area of pension trusts and did not intend to preempt all state laws that peripherally or tangentially concern vacation trusts.

Many Courts of Appeal and District Courts have found an exception in the ERISA preemption section within the context of spousal and child support. These courts have allowed ex-spouses and children of ERISA beneficiaries to levy on ERISA covered *pension* trusts.

The Franchise Tax Board contends that if this exception with regard to pension trusts can be made in the area of domestic relations, then it is clear that the State of California must be allowed to levy against a *vacation* fund.

II.

THE UNITED STATES DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OF THIS ACTION.

It must be noted at the outset that the United States District Court never had jurisdiction of this suit and the court should have remanded this suit to the State courts.

The Franchise Tax Board's causes of action originally filed in State court were based solely on State law. Federal law (ERISA) was raised merely as a defense to the causes of action.

It is clear that federal jurisdiction must be established solely by the complaint. (*Skelly Oil Co. v. Phillips Petroleum* (1950) 339 U.S. 667, 673-67; *Gully v. First National Bank* (1936) 229 U.S. 109, 113; *Tennessee v. Union & Planters' Bank* (1894) 152 U.S. 454, 459.)

The federal claim must not be asserted by way of defense. (*Gully v. First National Bank, supra*, 299 U.S. at 113.)

This Court has repeatedly and clearly held that in order for a claim to arise "under the Constitution, laws, or treaties of the United States," a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's cause of action. (*Phillips Petroleum Co. v. Texaco Co.* (1974) 415 U.S. 125, 126; *Gully v. First Nat. Bank, supra*, 299 U.S. at 112.)

This Court has also pointed out that the federal question must be disclosed upon the face of the complaint, unaided by the answer and the complaint itself will not serve as a basis of jurisdiction insofar as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. (*Phillips Petroleum Co. v. Texaco*

Co., supra, 415 U.S. at 127-128; *Gully v. First Nat. Bank, supra*, 299 U.S. at 113.)

The *Gully* case concerned an action by the State Collector of Taxes against a national bank as agent for its shareholders. This Court took the case to consider the jurisdiction of the District Court and decided that the District Court did not have jurisdiction. This Court said:

> "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. The tax here in controversy if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it." (*Gully, supra*, 299 U.S. at 115.)

This is directly analogous to the case at bar in that California imposed the income tax under State law and was attempting to collect it solely under State law. By raising the question of ERISA and preemption as a defense, appellees could not give the United States District Court jurisdiction.

III.
THE ALESSI CASE SHOULD BE CLARIFIED.

In *Alessi*, this Court found that a New Jersey statute was preempted by ERISA section 514(a), 29 U.S.C. § 1144(a), because it eliminated one method for calculating ERISA *pension* benefits that was permitted by federal law. This Court found that the New Jersey law applied *directly* to the calculation of the ERISA pension benefits. (*Alessi, supra*, 451 U.S. at 524-525;

The Ninth Circuit relied on the *Alessi* case to find that California's levying statute was preempted insofar as it permitted the Franchise Tax Board to levy against an ERISA regulated *vacation* trust to satisfy a beneficiary's delinquent taxes.

The Franchise Tax Board contends that the *Alessi* case has no application to the case at bar because *Alessi* concerned *pension* trusts while the case at bar concerns *vacation* trusts.

In addition, the New Jersey statute obviously was a direct regulation of ERISA pension plans because it mandated how they must not be calculated. The California statute, by contrast, does not even mention ERISA plans and in no way attempts to regulate ERISA-covered benefits.

In the *Alessi* case, this Court noted that it was only deciding the case before it and was not deciding the question of how broadly ERISA's preemption section should be applied. This Court said:

> "We need not determine the outer bounds of ERISA's pre-emptive language to find this New Jersey provision an impermissible intrusion on the federal regulatory scheme." (*Alessi, supra,* 451 U.S. at 525.)

In *Alessi*, this Court stated in a footnote that "Other courts have reached varying conclusions as to the meaning of ERISA's pre-emptive language in other contexts. . . . We express no views on the merits of any of those decisions." (*Alessi, supra,* 451 U.S. at 525 n. 21.)

As examples of the "other contexts," this Court referred to the cases of *American Tel. and Tel. Co. v. Merry* (2d Cir. 1979) 592 F.2d 118; *Stone v. Stone* (N.D. Cal. 1978) 450 F.Supp. 919, aff'd (9th Cir. 1980) 632 F.2d 740, cert. denied (1981) 453 U.S. 922 and *Gast v. Oregon* (1978) 585 P.2d 12, 36 Or. App. 441.

The *American Tel. and Tel.* and *Stone v. Stone* cases allowed wives to levy on the *pension* benefits of their former husbands. The Second Circuit in *American Tel. and Tel.* found that Congress did not mean to preempt state laws that touch upon ERISA plans only in the most remote and peripheral way. (*American Tel. and Tel., supra,* 592 F.2d at 121.)

In *Stone v. Stone*, the District Court found that ERISA section 514(a) was not designed to preempt any state law with even the most tangential relation to ERISA. 450 F.Supp. at 932.

In *Gast v. Oregon, supra*, 585 P.2d 12, the court found that ERISA did not preempt a state law which regulated the substantive nature of health and welfare benefits. The court basically found that ERISA does not fully regulate health and welfare benefits as opposed to pension benefits.

The Franchise Tax Board submits that this Court should approve the *American Tel. and Tel.*, *Stone* and *Gast* cases and thus give the lower courts guidance as to the limits of the *Alessi* holding. The Franchise Tax Board submits that this Court should further explain that the Ninth Circuit has impermissibly extended *Alessi* to areas not envisioned nor intended by this Court.

IV.

CALIFORNIA'S LEVYING STATUTE DOES NOT DIRECTLY CONFLICT WITH ANY PROVISION OF ERISA AND IT IS NOT PREEMPTED BY ERISA SECTION 514(a).

The Ninth Circuit found that California's levying statute conflicts with ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) which it found impliedly prevents levies against ERISA-covered vacation trust funds and that California's levy statute is also preempted by ERISA section 514(a), 29 U.S.C. § 1144(a) as a State law relating to an employee benefit plan.

A. There Is No Direct Conflict.

The majority opinion of the Ninth Circuit below admits that "ERISA does not in so many words protect vacation trusts from creditors' claims." (*Franchise Tax Bd., Etc., v. Construction Laborers, Etc.* (9th Cir. 1982) 679 F.2d 1307, 1309.)

However, it relies on ERISA's only anti-alienation clause, ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1),

which applies solely to *pensions*, to find an implied prohibition in ERISA against levying upon a *vacation* trust.

This implied preemption is contrary to the teaching of this Court which has held that where Congress has legislated in a field which the States have traditionally occupied, the historic police powers of the States will not be superseded by the federal legislation unless that was the "clear and manifest purpose of Congress." (*Rice v. Santa Fe Elevator Corp.* (1946) 331 U.S. 218, 230.)

The only specific non-alienation language to be found in ERISA refers only to pension plans and does not refer to employee welfare benefit plans (vacation trusts).

ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) states "Each *pension* plan shall provide that benefits provided under the plan may not be assigned or alienated." (Emphasis added.)

ERISA section 201, 29 U.S.C. § 1051 which defines the coverage of Part 2, Participation and Vesting, *excludes* employee welfare benefit plans (vacation trusts) from its coverage. ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) is a part of Part 2, *Participation & Vesting*. Therefore, by the terms of ERISA section 201(1), 29 U.S.C. § 1051 and by the terms of ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) itself, the non-alienation language applies *only* to pension plans. If Congress had intended to impose non-alienation conditions on employee welfare benefit plans (vacation trusts), it would have done so clearly and unambiguously. Congress has been silent regarding the alienation of the vacation benefits involved in this lawsuit. Therefore, the California statutes which allow the Board to levy on vacation benefits do not conflict with ERISA and a conflict should not be implied.

As this Court stated in *F.T.G. v. Simplicity Pattern Co.* (1958) 360 U.S. 55, 67, "We cannot supply what Congress has studiously omitted."

If Congress had intended to insulate vacation trusts from tax levies, it would have specifically so provided.

For example, in the Railroad Retirement Act of 1974, Congress has explicitly stated that Railroad Retirement annuities are not subject to any tax. The Railroad Retirement Act of 1974 provides that "no annuity . . . shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated. . . ." 45 U.S.C. § 231m.

In *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, this Court held that Railroad Retirement benefits are not subject to California's community property laws. As a part of its analysis of the Railroad Retirement Act, this Court pointed out that:

> "Even state collection laws must bow to its [the Railroad Retirement Act] command, for Congress added that phrase in an amendment designed in part to ensure that neither federal nor state tax collectors would encroach on the distribution of benefits." (*Hisquierdo v. Hisquierdo, supra,* 439 U.S. at 584.)

The Railroad Retirement Act's specific prohibition against a tax levy must be compared with ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) which refers to pension plans only and does not mention tax laws. The Railroad Retirement Act and ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) must both be contrasted to the area of employee welfare benefit plans (vacation trusts) where Congress has not prohibited tax levies or any other levies.

It must also be noted that with respect to Social Security benefits, Congress has specifically said they could not be alienated or assigned and that they were not subject to "execution, levy, attachment, garnishment . . ." 42 U.S.C. § 407, and with respect to Veteran's benefits, Congress has said such payments "shall not be liable to attachment, levy, or seizure . . ." 38 U.S.C. 3101(a).

B. California's Levying Statute Is Not Preempted by ERISA Section 514(a).

The majority of the Ninth Circuit panel below found that California's levying statute was preempted by ERISA section 514(a), 29 U.S.C. § 1144(a).

The Board contends that Congress did not intend to totally occupy the field of vacation trusts because large sections of ERISA have no application to vacation trusts. Furthermore, the California statute will not obstruct the objectives of Congress regarding ERISA.

A review of ERISA indicates that Congress did not regulate as thoroughly with regard to employee welfare benefit plans (vacation trusts), as it did with regard to pension plans. Both the statement of legislative intent contained in ERISA section 2,, 29 U.S.C. § 1001 and the various portions of ERISA indicate that Congress meant to confine federal regulation of employee welfare benefit plans (vacation trusts) to establishing minimum standards for reporting and disclosure and fiduciary responsibility. The regulation of pension trusts is much more pervasive. Specifically, there are sections of ERISA which apply to *pension* trusts only and do not apply to vacation trusts.

For example, Part One of ERISA deals with reporting and disclosure requirements for *both* pension and welfare benefit plans. ERISA section 101, *et seq.*, 29 U.S.C. § 1021, *et seq.*

Parts Two and Three are entitled Participation and Vesting and Funding and establish vesting and funding requirements. ERISA section 201, *et seq.*, 29 U.S.C. § 1051, *et seq.*, and ERISA section 301, *et seq.*, 29 U.S.C. § 1081, *et seq.* These parts apply only to pension benefit plans and not to welfare benefit plans (vacation trusts). ERISA section 201(1), 29 U.S.C. § 1051(1), ERISA section 301(a)(1), 29 U.S.C. § 1081(a)(1).

Part Four is entitled Fiduciary Responsibility and applies to both pension and welfare benefit plans. ERISA section 401, *et seq.*, 29 U.S.C. § 1101, *et seq.*

Part Five is entitled Administration and Enforcement and deals with *both* pension and welfare benefit plans, ERISA section 501, *et seq.*, 29 U.S.C. § 1131, *et seq.*

It is clear that if Congress has intended to totally preempt the field of vacation trusts then *all* not *some* of the ERISA sections would be applicable to vacation trusts.

C. California's Statute Does Not Regulate ERISA-Covered Vacation Trusts.

ERISA section 514(a), 29 U.S.C. § 1144(a) provides that "State" laws relating to employee benefit plans are superseded. The term "State" is defined to mean ". . . a State . . . which purports to *regulate*, directly or indirectly, the terms and conditions of employee benefit plans. . . ." (Emphasis added.) ERISA section 514(c)(2), 29 U.S.C. § 1144(c)(2).

When Congress provided for the general preemption section of ERISA, it was concerned with conflicting or inconsistent state and local regulation of employee benefit plans. ERISA was not intended to preempt all state law on all subjects that might have some peripheral, non-regulatory connection with employee benefit plans. (See *General Motors Corp. v. Townsend* (E.D. Mich. 1976) 468 F.Supp. 466.)

A review of the provisions of ERISA itself will indicate the areas where Congress intended to regulate.

Title 1 of ERISA is entitled "Protection of Employee Benefit Rights." The five sub-parts of Title 1 are as follows:

Part 1 — Reporting and Disclosure

Part 2 — Participation and Vesting

Part 3 — Funding

Part 4 — Fiduciary Responsibility

Part 5 — Administration and Enforcement

Title II concerns amendments to the Internal Revenue Code; Title III concerns Jurisdiction, Administration, Enforcement; Joint Pension Task Force, Etc., and Title IV concerns Plan Termination Insurance.

Congress meant to *regulate* ERISA plans in order to correct the past problems that workers had experienced with their benefit plans. This is why Congress carefully legislated in the areas of reporting and disclosure, participation and vesting, funding, fiduciary responsibility and administration and enforcement.

Revenue and Taxation Code section 18817 does not regulate ERISA plans in any way and specifically not in the areas of reporting and disclosure, participation and vesting, funding, etc. For example, Revenue and Taxation Code section 18817 obviously does not concern the vesting of a benefit plan or the fiduciary obligations of the Trustees.

The Board contends that the subjects covered by Titles I through IV are those which Congress intended to regulate. The Board further contends that Revenue and Taxation Code section 18817 is not meant to and *does not regulate* ERISA plans in any way and specifically not with regard to the areas covered by Congress.

V.

OTHER COURTS HAVE ALLOWED CREDITORS TO LEVY ON VACATION AND PENSION BENEFITS.

Prior to the case at bar, the only reported case which dealt directly with the issue of whether a creditor could levy on an ERISA-covered employee welfare benefit plan (vacation trust) was *Electrical Workers v. IBEW-NECA Holiday Trust* (1979) 583 S.W.2d 154. The opinion below did not mention this case.

At issue in the *Electrical Workers* case was whether a credit union could garnish the Holiday Trust Fund pursuant to a judgment it had obtained against an IBEW member.

The court *allowed* the credit union to garnish the *Holiday Trust Fund*. The court stated that creditors could not garnish a *pension* benefit plan because of ERISA's anti-assignment clause, ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1), but that the anti-assignment clause applied *only to pension plans*. The Supreme Court of Missouri found that the Missouri state law was not preempted because of a conflict with ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1), because the Holiday Trust was not a pension benefit plan. The Court then had to consider whether ERISA section 514(a), 29 U.S.C. § 1144(a) would preempt Missouri's state law.

Citing the test set forth in *Stone v. Stone* (N.D. Cal. 1978) 450 F.Supp. 919, 932, aff'd., (9th Cir. 1980) 632 F.2d 740, cert. denied, (1981) 453 U.S. 922, the Court stated, "The question we must answer is whether the Missouri state laws and policies we might wish to apply 'fall into [the] narrow category of laws which affect employee benefit plans but which do not relate to them within the meaning of § 1144(a).' " (*Electrical Workers, supra*, 583 S.W.2d at 158.)

The court then discussed the cases which have broadly construed ERISA section 514(a), 29 U.S.C. § 1144(a) and contrary cases such as *Stone v. Stone, supra*, which "have been reluctant to invalidate so much state legislation when the intent of Congress is not unmistakenly clear." (*Electrical Workers, supra*, 583 S.W.2d at 159.) The Court relied on the reasoning in the case of *Gast v. Oregon, supra*, 585 P.2d 12 and found no indication that Congress meant "to pre-empt areas of state regulation not addressed by ERISA or to leave such areas totally unregulated . . ." *Ibid.* The court concluded, "[T]he enforcement of state court money judgments by creditors is a valid area of state concern, and is one which is totally unregulated by ERISA with respect to welfare plans." *Ibid.*

In *National Bank of N.A. v. Intern. Broth., etc.* (1979) 419 N.Y.S.2d 127, 69 A.D.2d 679, appeal dismissed, 48

N.Y.2d 752, 422 N.Y.S.2d 666, 397 N.E.2d 1333, the court allowed a creditor to levy on or garnish a pension trust regulated by ERISA. The Trustees argued first that ERISA generally preempts all State statutes which affect the regulation of pension plans. The trustees next argued that the remedy of garnishment was expressly prohibited by ERISA section 206(d), 29 U.S.C. § 1056(d).

The court held that there was no absolute preemption of the State's procedures for enforcing money judgments. The court went on to explain that the state statute didn't relate to or interfere with the purposes of ERISA. The court found that the purposes of ERISA were to assure the equitable character and financial soundness of employee benefit plans and to protect the beneficiaries of the funds from mismanagement of those funds by the fiduciaries of the plans.

The New York court concluded its preemption discussion as follows:

> "A State statute will be pre-empted only when it tends to invade an aspect of the regulation of pension funds that is governed by ERISA as established in the Federal act. However, New York's vital interest in assuring the enforceability of our courts' judgments is wholly peripheral to the purposes of ERISA (citation). The state statute makes no attempt to regulate pension plans and presents no cognizable encroachment upon the exclusive province of ERISA regulation." (419 N.Y.S.2d at 130.)

VI.

OTHER COURTS HAVE FOUND AN EXCEPTION IN ERISA's PREEMPTION SECTION REGARDING THE AREA OF DOMESTIC RELATIONS.

The Ninth Circuit and the Second Circuit have held that a State's domestic relations laws are not preempted by ERISA and that former spouses could garnish ERISA-regulated *pension* trusts in order to collect child support and/or alimony obligations.

The Franchise Tax Board contends that a State's tax laws should be given the same respect as its domestic relations law and held not to be preempted by ERISA.

The Ninth Circuit in *Operating Engineers v. Zamborsky* (9th Cir. 1981) 650 F.2d 196 held that an ERISA regulated *pension* fund was subject to garnishment by an ex-spouse to satisfy alimony obligations. In coming to the above conclusion, the Ninth Circuit found that Congress did not intend to preempt the area of domestic relations and that the "police power of the States (would not) be superseded by (a federal law) unless that was the the clear and manifest purpose of Congress." (*Operating Engineers v. Zamborsky, supra*, 650 F.2d at 199, citing *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230.)

The Ninth Circuit in *Stone v. Stone* (9th Cir. 1980) 632 F.2d 740, cert. denied (1981) 453 U.S. 922 affirmed the District Court decision, *Stone v. Stone* (1978) 450 F.Supp. 919, which held that ERISA did not preempt a state court from ordering an ERISA-regulated *pension* plan to pay a plan participant's pension benefits directly to his or her ex-spouse.

In the District Court opinion, the court pointed out that "Section 514(a) was not, however, designed to preempt any state law with even the most tangential relation to ERISA." (*Stone v. Stone, supra*, 450 F.Supp. at 932.)

The Ninth Circuit in *Carpenters Pension Trust, Etc. v. Kronschnabel* (9th Cir. 1980) 632 F.2d 745, cert. denied (1981) 453 U.S. 922 (relying on the case of *In re Marriage of Campa* (1979) 89 Cal.App.3d 113, 152 Cal.Rptr. 362, appeal dismissed (1980), 444 U.S. 1028, held that ERISA does not preempt state court orders directing an ERISA-regulated pension plan to pay a community property share of a pension plan participant's monthly benefit payments directly to his or her ex-spouse.

The Second Circuit in *American Tel. and Tel. Co. v. Merry* (2nd Cir. 1979) 592 F.2d 118 held that an ex-spouse

could garnish ERISA-regulated *pension* benefits to satisfy alimony and support obligations. The Second Circuit stated that it would be unreasonable to conclude "that Congress intended to preempt even those state laws that only in the most remote and peripheral manner touch upon pension plans." *Id.* at p. 121.

The Board contends that the sovereign police power of a State to assess and collect taxes, especially from a *vacation* trust, is analogous to and just as important as the power of a State to control the area of domestic relations. Thus if the area of domestic relations is not preempted by ERISA, then the collection of taxes should not be preempted.

VII.

THE NINTH CIRCUIT HAS ERRONEOUSLY CONSTRUED ERISA IN A MANNER WHICH INTERFERES WITH THE SOVEREIGN RIGHT OF CALIFORNIA TO ASSESS AND COLLECT TAXES.

The power to tax is an incident of sovereignty and is co-extensive with sovereignty. *Harvester Co. v. Dept. of Taxation* (1944) 322 U.S. 435, 445; *Curry v. McCanless* (1938) 307 U.S. 357, 366; *McCullock v. Maryland*, 4 Wheat. 316, 429.

It follows that "A necessary incident of power to tax property is the power to uniformly enforce the collection of the tax by any constitutional means deemed appropriate to that end." *United States v. Hester* (10th Cir. 1943) 137 F.2d 145, 147-148.

The Board contends that the State of California has a vital interest in collecting taxes from taxpayers. This vital interest was recognized long ago by this Court in *Dows v. City of Chicago* (1870) 78 U.S. (11 Wall.) 108, where a National Bank tried to restrain the collection of a tax levied by the City of Chicago upon the bank's capital shares. This Court decided that no court could enjoin the collection of the tax, and stated as follows:

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." *Dows, supra*, 78 U.S. at 110.

ERISA section 514(a) may be unconstitutional if it interferes with the sovereign right of the State of California to uniformly collect taxes from all of its citizens. Thus, ERISA should be interpreted so that it does not interfere with this right. As this Court said in *International Association of Machinists, et al. v. Street* (1960) 367 U.S. 740, "Federal statutes are to be construed as to avoid serious doubt of their constitutionality." *Id.*, p. 749; *Accord, Lynch v. Overholser* (1961) 369 U.S. 705, 710-711. In *Fry v. United States* (1975) 421 U.S. 542, this Court stated as follows:

> "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' United States v. Darby, 312 U.S. 100, 124 (1941), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Fry, supra*, 421 U.S. at 547 n.7.

In *National League of Cities v. Usery* (1976) 426 U.S. 833, this Court held that even the Commerce Clause did not give Congress the authority to intrude upon a State's performance of essential governmental functions. This Court said:

> "We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack affirmative grant of legislative authority to reach the matter, but because the

Constitution prohibits it from exercising the authority in that manner. *National League of Cities, supra*, 426 U.S. at 845.

The Franchise Tax Board respectfuly contends that the Ninth Circuit's interpretation of ERISA is incorrect in that Congress did not intend to preempt California's statute. Furthermore, ERISA should not be interpreted to interfere with the sovereign power of California to assess and collect its taxes.

Conclusion.

For the above stated reasons, the Franchise Tax Board respectfully submits that the court should note probable jurisdiction; (1) to clarify the meaning and effect of ERISA section 514(a) by construing it to not preempt the State of California from levying on ERISA covered vacation trusts; (2) to clarify the language in *Alessi* by stating that it does not apply to a State's levy on a vacation trust; (3) to declare that the United States District Court did not have subject matter jurisdiction of this action; (4) to declare that Congress did not intend to nor did it have the power to interfere with the sovereign power of the State of California to collect its taxes.

Respectfully submitted,

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Appendix A.

Opinion.

United States Court of Appeals for the Ninth Circuit.

Franchise Tax Board of the State of California, Appellee, v. Construction Laborers Vacation Trust for Southern California, Edward Ashton, Al Atwood, Gary Bronneck, John Clarke, R. C. Gallyon, Richard Greenberg, Roger Jaska, William Middleton, Louis Bravo, Benjamin T. James, George Mattocks, William R. McClain, Nick Orsura, Joe Rivera, Ray M. Wilson, and James Keyes, Appellants. No. 80-6080. DC No. 80-02741.

Filed: June 22, 1982.

Appeal from the United States District Court for the Central District of California. Manuel L. Real, District Judge, Presiding. Argued and submitted February 2, 1982.

Before: GOODWIN and TANG, Circuit Judges, and SOLOMON,* District Judge.

GOODWIN, J.

Three union members owe the State of California $48.70, $206.95 and $124.91 in unpaid personal income tax. The Franchise Tax Board of California levied against money held in trust for the three by the Construction Laborers' Vacation Trust Fund. When trustees for the fund refused to pay over the money owed, the state brought action for declaratory relief. The district court,[1] on cross motions for

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

[1]If the case were a challenge to a tax, 28 U.S.C. § 1341 would preclude removal jurisdiction. But here the state is challenging a trust created under a federal statute. A fiduciary under 29 U.S.C. § 1002(14)(A) has been sued and moved to remove the case to the district court. The trust has raised a federal question under ERISA and 29 U.S.C. § 1132 makes the amount in controversary immaterial.

summary judgment, held that the vacation fund was not protected from the levy.

The Trust appeals on the ground that ERISA (Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001;, *et seq.*) preempts California's attempt to levy on the vacation trust for unpaid taxes. The Trust relied on an ERISA Advisory Opinion from the Department of Labor. The state relies on the difference between vacation benefits and retirement benefits, and asserts that Congress intended to protect only the latter.

The facts are undisputed. Much of the law is likewise undisputed. When delinquent taxes are owed to the State of California, the state is authorized to issue a notice to withhold under California Revenue and Taxation Code, § 18817, which reads:

> "The Franchise Tax Board may be notice, served personally or by first class mail, require any employer, person, officer or department of the State, political subdivision or agency of the State . . . having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer or to an employer or person who has failed to withhold and transmit amounts due pursuant to Section 18815 or 18818, to withhold, from credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer . . . and to transmit the amount withheld to the Franchise Tax Board at such time as it may designate."

ERISA specifies that its provisions "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ." 29 U.S.C. § 1144(a).An employee benefit plan is defined as a welfare plan or a pension plan. 29 U.S.C. § 1002(3). A welfare

benefit plan, in turn, is defined as a plan with "medical, surgical . . . accident, disability . . . or vacation benefits." 29 U.S.C. § 1002(1).

The Trust in the instant case is an employee benefit trust to which employer parties to collective bargaining agreements with the Southern California District Council of Laborers must contribute. Contributions are made for each hour worked or are otherwise paid pursuant to the bargaining agreement.

The Trust maintains a "vacation account" for each laborer and at a specific time gives him or her a check for his or her accumulated vacation benefits. The Trust is a spendthrift trust designed to insure that the beneficiaries do not dissipate the benefits. Article 9.08 of the Trust Agreement provides:

> "It is the intent and purpose of the Plan, and of this Agreement, and a material part of the consideration for the making of contributions to the Fund by individual employers, that the money in each vacation account shall be received by the employee entitled thereto personally. Accordingly, *no payments due the Fund and no monies in the vacation accounts established pursuant to the Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge by any employee or other person and any such anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge shall be void and ineffective*. The money credited to the vacation account shall be subject to withdrawal and distribution only at the times, and in the manner and for the purposes specified in this Agreement." [Emphasis added.]

In a similar vein, § 4.06 of the Trust Agreement restrains the beneficiaries from alienating the accumulated money and specifies that the money "shall be exempt from the

claims of creditors or other claimants from all orders, decrees, garnishments, executions or other legal or equitable process or proceedings."

ERISA does not in so many words protect vacation trusts from creditors' claims, as it does protect pension plans. 29 U.S.C. § 1056(d)(1). Extending similar protection to vacation funds is consistent with the statute, however, if not demanded by it. Both types of ERISA plans have the same goal: to provide accumulated money to a worker for future beneficial use. The worker's money deserves trust protection from dissipation regardless of the purpose for which the money has been set aside under ERISA.

While the state has pointed out differences between pension funds which are conceded to be protected and vacation funds which the state seeks to reach for tax collection, the state has not identified a legal basis to warrant a retreat from preemption. Moreover, Congress has not left us at liberty to construe preemption as the state would have us construe it.

The same chapter of ERISA that describes the scope of protection of employee pension benefits provides for federal preemption in connection with welfare benefit plans. 29 U.S.C. § 1144(a). See *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981).

The vacation trust fund now before the court is obviously a benefit plan described in § 1002(1). Accordingly, under the teaching of the *Alessi* case, which had not been decided when this matter was before the district court, we have no choice but to reverse with directions to enter judgment for the appellants.

The judgment in favor of the state is vacated and the cause is remanded for the entry of a declaratory judgment

in favor of the appellants as prayed for in their cross-motion or summary judgment. Each party is to pay its own costs.

DISSENTING OPINION.

Franchise Tax Board v. Construction Laborers Vacation Trust, No. 80-6080.

Filed: June 22, 1982.

TANG, Circuit Judge dissenting:

I respectfully dissent. The majority opinion is flawed in two major respects. First, I doubt whether the district court possessed subject-matter jurisdiction over this action. Second, even if the district court possessed subject-matter jurisdiction, I disagree with the majority opinion's conclusion that ERISA preempts the California levying statute.

I. *The Absence of Subject-Matter Jurisdiction.*

It is axiomatic that an action brought in state court may be removed only if federal question, diversity, or some other independent federal jurisdictional basis exists. 28 U.S.C. § 1441(a) (1976); *Guinasso v. Pacific First Federal Savings & Loan Association*, 656 F.2d 1364, 1366 (9th Cir. 1981). It is likewise axiomatic that the jurisdictional basis for removal must be apparent from the plaintiff's complaint rather than from the defendant's answer or counterclaim. *See Gully v. First National Bank in Meridian*, 299 U.S. 109, 112-18 (1936).

The Franchise Tax Board's complaint does not provide these two fundamental basis for removal. Its prayer for relief is grounded purely upon state law and seeks recovery against only an in-state defendant. No federal question is raised,

nor does diversity of citizenship exist.[1] It is only the Trustees' defense that poses a federal question, namely, whether ERISA preempts the state levying statute. When raised as a defense, however, federal preemption is an insufficient jurisdictional basis for removal. *See, e.g., Guinasso*, 656 F.2d at 1366. The conclusion is inescapable that the district court lacked subject matter jurisdiction over this action to have permitted removal. *See Gully*, 299 U.S. at 112-18 (removal improper where plaintiff state tax collectors' cause of action based in state law and federal question presented only in defendant's answer). The district court judgment should therefore be vacated with instructions to remand the action to state court.

II. *Preemption by ERISA.*

The issue on the merits is whether ERISA preempts the California levying statute insofar as the state statute permits the Franchise Tax Board to levy against a vacation trust to

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[1]Admittedly, in determining the jurisdictional basis for removal, federal courts are not necessarily bound by how the plaintiff couches his claim. Sometimes federal law wholly displaces a plaintiff's state law remedies. In such cases, although a plaintiff purports to rely upon a state remedy, any right he possess is based in federal law, conferring federal question jurisdiction over his action. *See, e.g., Fristoe v. Reynolds Metal Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980).

This basis for removal jurisdiction was applied in *Stone v. Stone*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, ___ U.S. ___, 101 St.Ct. 3158 (1981), to a state-based claim involving an ERISA issue. The plaintiff in *Stone* brought a state-created conversion action in state court against a pension plan, alleging that she owned a 40% community interest in the pension benefits of her divorced husband. Although her complaint based relief solely upon state law, the Ninth Circuit ruled that federal question jurisdiction supported removal because ERISA gave her standing as a plan "participant" to sue under ERISA § 502(a), 29 U.S.C. § 1132(a) (1976), to enforce a pension obligation. *Stone*, 632 F.2d at 743.

Stone, however, does not extend to this case. ERISA § 502(a) confers standing only to plan participants, beneficiaries, fiduciaries, and the Secretary of Labor. Unlike the disappointed spouse in *Stone*, the Franchise Tax Board does not fall into any of these categories. If it has a remedy, it is state-created and not based upon ERISA. The rationale supporting removal jurisdiction is therefore absent here.

satisfy a beneficiary's delinquent taxes. The majority opinion concludes that the levying statute is preempted. It finds first that the levying statute is in conflict with an implied requirement in ERISA prohibiting levies against vacation trust funds and, second, that the levying statute falls within the preemptive scope of ERISA § 514(a), 29 U.S.C. § 1144(a) (1976), as a State law relating to an employee benefit plan.[2] *Ante* at 3-4. Neither ground is persuasive.

A. *Direct Conflict with ERISA.*

It is clear that a state's levying statute is preempted if it directly conflicts with one of ERISA's regulatory provisions. *See, e.g., Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978). The majority opinion concedes that "ERISA does not in so many words protect vacation trusts from creditors' claims," *ante* at 3, but argues that ERISA's purpose and the anti-alienation clause in section 206(d)(1), 29 U.S.C. § 1056(d)(1) (1976)[3] supports finding an implied prohibition in ERISA against levying a vacation trust. *Ante* at 3.

The proposed opinion's reliance upon ERISA § 206(d)(1) is misplaced. Section 206(d)(1) explicitly states that it governs only *pension* funds. The plan here is a vacation trust fund, which fits within the definition of an "employee wel-

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[2]Section 514(a) provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

29 U.S.C. § 1144(a) (1976).

[3]Section 206(d)(1) provides in full:

> Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

29 U.S.C. § 1056(d)(1) (1976).

fare benefit plan." 29 U.S.C. § 1002(1). An "employee welfare benefit plan" in turn is strictly distinguished under ERISA from a "pension plan" and is excluded from the statutory part containing the anti-alienation provision. *See* 29 U.S.C. §1051(1).

Nor can an anti-alienation restriction be fairly implied from ERISA to apply to employee welfare benefit plans. First, the care Congress exercised in drafting section 206(d)(1) to exclude employee welfare benefit plans from that section's coverage should alone be sufficient to conclude that Congress did not mean to create an implied anti-alienation restriction. *See FTC v. Simplicity Pattern Co., Inc.*, 360 U.S. 55, 66-67 (1959). Second, no support can be found in ERISA's legislative history to suggest that Congress meant to immunize employee welfare benefit plans from garnishment, attachment or levy.

Third, ERISA's purposes do not mandate implying an anti-alienation restriction that is applicable to employee welfare benefit plans. The majority opinion argues that Congress was just as concerned with vacation funds as it was with pension funds. ERISA's regulatory structure suggests otherwise. ERISA heavily regulates pension funds. It imposes extensive reporting and disclosure requirements, minimum plan standards for participant eligibility and vesting, minimum funding standards, and standards of conduct for persons who serve in a fiduciary capacity to a plan. In contrast, the only statutory requirements imposed upon employee welfare benefit plans are the reporting and disclosure requirements of Part I and the fiduciary responsibility standards of Part IV. ERISA's limited regulation of welfare plans strongly suggests that Congress was more concerned with the possible dissipation of pension benefits than with the possible loss of employee welfare benefits. This difference in concern should not be surprising. In real world

terms, the loss of one's pension is far more catastrophic than the loss of funds devoted to financing an annual vacation.

Even if section 206(d)(1) applies to vacation trusts, either directly or by implication, it is doubtful whether section 206(d)(1) by its own force preempts state levying statutes. When Congress has intended to preempt state levy and attachment statutes, it has manifested its intent in explicit statutory language. *See, e.g.*, 38 U.S.C. § 3101(a) (veteran's benefits); 42 U.S.C. § 407 (Social Security Act); 45 U.S.C. § 231m (Railroad Retirement Act). *See also National Bank of North America v. International Brotherhood of Electrical Workers Local #3*, 419 N.Y.S. 2d 127, 131-32, 69 A.D.2d 679, ___, *appeal dismissed*, 48 N.Y.2d 752, 422 N.Y.S. 2d 666, 397 N.E. 2d 1333 (1979). Section 206(d)(1), however, makes no mention of either levy or attachment.

Moreover, to the extent that the section does impose a restriction, the Ninth Circuit decision in *Operating Engineers v. Zamborsky*, 650 F.2d 196, 201 (9th Cir. 1981), suggests that section 206(d)(1) governs merely the standards a plan must recite and does not limit a state's power to reach trust funds. While *Zamborsky* dealt only with garnishment statutes and not levying statutes, its rationale appears to compel the conclusion that section 206(d)(1) does not limit a state's traditional power to authorize a tax levy against a trust.

B. *Preemption by Section 514(a).*

Aside from relying upon section 206(d)(1), the majority opinion also argues that ERISA § 514(a) preempts the California levying statute. *Ante* at 3-4. Although the majority opinion's reasoning is not entirely clear, it apparently finds

dispositive the Supreme Court's recent decision in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524 (1981).

Alessi, however, does not lend strong support for the proposed opinion's position. The key element in *Alessi*'s finding of federal preemption was the Court's conclusion that Congress had *expressly* intended to give pension administrators the option of offsetting pension benefits against workmen's compensation awards. *Id.* at 514-21, 524. The New Jersey statute under challenge there frustrated this Congressional command by prohibiting pension offsets. Given this direct conflict between federal and state legislative will, the Court acknowledged that it did not need to explore the outer limits of section 514(a)'s preemptive scope to hold the state statute preempted. *Id.* at 524. Indeed, given this direct conflict, it is likely that the state statute in *Alessi* would have been preempted even in the absence of section 514(a).

In contrast to the offset issue in *Alessi*, nothing in ERISA's statutory text or its legislative history reveals Congress' intention toward state levying statutes. The direct conflict between federal and state law that was present in *Alessi* is absent here. *Alessi* thus offers little guidance.

The absence of a direct conflict with one of ERISA's provisions does not necessarily mean that section 514(a) does not preempt the California levying statute. Section 514(a) states broadly that ERISA "supercede[s] . . . State laws insofar as they may *relate to* any employee benefit plan . . ." 29 U.S.C. § 1144(a) (emphasis added). This expansive language is refined by the section's definition of "State", which "includes a State, any political subdivision thereof, or any agency or instrumentality of either, which purports *to regulate, directly or indirectly*, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. § 1144(c)(2) (emphasis added). This

choice of language indicates that Congress meant section 514(a) to have a far-reaching preemptive effect, superceding not only laws that directly regulate employee benefit plans, plan *qua* plan, but also laws that have a regulatory effect. *See generally Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1298-1300 (N.D. Cal. 1977) (detailing section 514's legislative history), *aff'd*, 571 F.2d 502 (9th Cir.), *cert. denied*, 439 U.S. 831 (1978).

Section 514(a)'s scope, however, is not unlimited. The legislative choice of the word "regulate" in section 514's definitions suggests that the section was not designed to preempt state laws having only a tangential, non-regulatory effect on benefit plans. Had that been the design, less restrictive words such as "affect", "influence", or "connected with" would have been employed, or benefit plan administrators would have been given blanket immunity from the application of state law. Thus, there exists a "narrow category of laws which *affect* employee benefit plans but which do not *relate* to them within the meaning of § 514(a)." *Stone v. Stone*, 450 F. Supp. 919, 932 (N.D. Cal. 1978) (emphasis added), *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, ___ U.S. ___, 101 S.Ct. 3158 (1981). *See also Zamborsky*, 650 F.2d at 199-200.

In my opinion, the California levying statute falls within this narrow category of state laws. The state statute seeks only to secure payment of delinquent taxes and treats trust funds as merely another taxpayer asset the state may tap to achieve this aim. The statute does not regulate, directly or indirectly, plan reporting, disclosure, participation, funding, vesting, benefit calculation, or the trustees' fiduciary responsibilities.

The only "regulatory" effect the Trustees have identified is the administrative burden associated with processing levy notices. Similarly, the Department of Labor argues that tax

levy statutes are preempted because of the administrative burden entailed in litigating a levy's validity. *See* ERISA Opinion Letter 79-90A, [1979-1981 Transfer Binder] Pens. Plan Guide (CCH) ¶ 25,331. This effect is simply too minor to be considered "regulatory." If administrative inconvenience is alone sufficient to invoke section 514's preemptive operation, state income taxation of trust assets would also be preempted under the statute because preparing state tax forms is time-consuming and might involve litigation. Acceptance of the administrative inconvenience rationale would also require overruling prior Ninth Circuit precedent permitting attachment of pension fund benefits to satisfy marital support obligations because attachment also requires substantial administrative processing and might involve litigation. *See id.* at 199-200; *Carpenters's Pension Trust v. Kronschnobel*, 632 F.2d 745 (9th Cir. 1980), *cert. denied*, ___ U.S. ___, 101 S.Ct. 3158 (1981); *Stone*, 632 F.2d at 742.

It is also doubtful whether the state statute imposes a serious administrative burden on the Trustees. Employee benefit plans are currently subject to *federal* tax levies. *See* 26 C.F.R. § 1.401(a)-13(b)(2). Processing state tax levies should be no more exotic or burdensome.

Interpreting section 514(a) to preempt the California levying statute also raises grave constitutional difficulty. A state's taxing power is one of its attributes of sovereignty, existing independent of the Constitution and reserved under the Tenth Amendment except as conditioned by other provisions of the Constitution. *See Railroad Co. v. Peniston*, 85 U.S. (18 Wall.) 5, 29 (1873). A necessary incident of this power is the power to enforce uniformly the collection of a tax. *See United States v. Hester*, 137 F.2d 145, 147-48 (10th Cir. 1943). A finding of federal preemption here will pose a serious obstacle to the state's exercise of this

power, casting doubt on section 514(a)'s constitutionality. The constitutional difficulty this construction creates provides an additional reason for construing section 514(a) not to preempt the California levying statute. *See Lynch v. Overholser*, 369 U.S. 705, 710-11 (1962) (federal statutes are to be construed to avoid serious doubt of constitutionality); *International Association of Machinists v. Street*, 367 U.S. 740, 749 (1961) (same).

Assuming the district court possessed subject-matter jurisdiction, I would affirm the district court's judgment.

Appendix B.

Judgment.

United States District Court, Central District of California.

Franchise Tax Board of the State of California, Plaintiff, v. Construction Laborers Vacation Trust for Southern California, Edward Ashton, Al Atwood, Gary Bronneck, John Clarke, R. C. Gallyon, Richard Greenberg, Roger Jaska, William Middleton, Louie Bravo, Benjamin T. James, George Mattocks, William R. McClain, Nick Orsura, Joe Rivera, Ray M. Wilson, James Keyes, as Trustees, and on behalf of Construction Does I to XXX, inclusive, Defendants. Case No. 80-02741-R.

Filed: December 3, 1980.

Cross-motions for summary judgment came on for hearing before this Court on October 20, 1980, the Honorable Manuel L. Real presiding. Patti S. Kitching, Deputy Attorney General, appeared on behalf of the plaintiff and James P. Watson of Cox, Castle and Nicholson, appeared on behalf of the defendant. The Court examined the exhibits submitted in support of and in opposition to said motions, reviewed the Memoranda of Points and Authorities, and the matter was argued and submitted.

The Court being fully advised herein and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff Franchise Tax Board's motion for summary judgment is granted.

2. Defendant Construction Laborers Vacation Trust for Southern California (hereinafter defendant Trust Fund) wrongfully failed and refused to honor the levies of the Franchise Tax Board upon defendant Trust Fund

in collection of the tax indebtedness of beneficiaries Jesse Murphy, Eriberto Salcedo and Vincent Zarate.

3. The Franchise Tax Board has been damaged as a direct and proximate result of defendant Trust Fund's wrongful failure and refusal to honor the Franchise Tax Board's levy and garnishment.

4. The Franchise Tax Board is awarded judgment against defendant in the amount of $395.49 as of November 5, 1980, with interest of $0.083 per day accruing as of November 6, 1980.

5. Defendant is legally obligated to honor all future levies by the Franchise Tax Board upon defendant Trust Fund in collection of tax delinquencies of the beneficiaries of defendant Trust Fund.

DATED: December 3, 1980.

[Stamp] Manuel L. Real

MANUEL L. REAL

United States District Judge

Appendix C.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Franchise Tax Board of the State of California, Plaintiff, v. Construction Laborers Vacation Trust for Southern California, Edward Ashton, Al Atwood, Gary Bronneck, John Clarke, R. C. Gallyon, Richard Greenberg, Roger Jaska, William Middleton, Louie Bravo, Benjamin T. James, George Mattocks, William R. McClain, Nick Orsura, Joe Rivera, Ray M. Wilson, James Keyes, as Trustees and on behalf of Construction Does I to XXX, Inclusive, Defendants. Case No. 80-02741-R.

Filed: December 3, 1980.

The Franchise Tax Board of the State of California (the Board) filed a complaint for failure to honor garnishment and for declaratory relief in the Superior Court of the State of California for the County of Los Angeles. The Construction Laborers Vacation Trust for Southern California (the Trust) and the trustees thereof removed the suit to Federal Court and filed a motion to dismiss. The Board's motion to remand was denied by this court. The parties stipulated that this court could treat the motion to dismiss as if cross-motions for summary judgment had been filed by the parties and that no triable issues of fact remain in this case.

The cross-motions for summary judgment came on for hearing before the Honorable Manuel L. Real, United States District Judge, on October 20, 1980.

Based upon the papers filed by the parties, the pleadings and the oral argument advanced at the time of the hearing, the court makes the following findings of fact and conclusions of law.

I

FINDINGS OF FACT

1. The parties have stipulated that there are no facts in dispute.

2. The Board is the duly constituted agency of the State of California charged with the enforcement of the Personal Income Tax Law of the State of California and is authorized pursuant to California Revenue and Taxation Code section 18817 to issue notices to withhold to enforce collection of unpaid tax liabilities.

3. Construction Laborers Vacation Trust for Southern California is, and was at all times mentioned herein, an express trust established on April 14, 1966, by written agreement and declaration of trust.

4. The Southern California District Council of Laborers and various employers' associations entered into a collective bargaining agreement which provides for the establishment of a fund for the payment of paid vacations. (Trust Agreement, Article II.)

5. The trust was established to receive contributions and to provide vacation benefits for eligible employees. (Trust Agreement, Article II.)

6. The Construction Laborers Vacation Trust for Southern California is an "employee welfare benefit plan" as defined by 29 USC § 1002(1) and an "employee benefit plan" as defined by 29 USC § 1002(3). It is not an "employee pension benefit plan" as defined by 29 USC § 1002(2).

7. Contributions to the fund are a part of the wages due to the employees covered by the collective bargaining agreement and are subject to withholding tax and social security and unemployment taxes. (Trust Agreement, Article IX.)

8. Under the collective bargaining agreement, employers are obligated to pay to the Trust a fixed sum per hour

for each hour worked on behalf of each employee whose work is covered by the collective bargaining agreement. (Trust Agreement, Article VI.)

9. The Trust accumulates the contributions in a "vacation account" for each covered employee. The Trust issues a check annually for the vacation benefits to each covered employee who meets certain requirements set forth in the Trust Agreement. (Trust Agreement, Article IX.)

10. Jesse Murphy, while a resident of the State of California during the tax year ending December 1976, incurred personal income tax liability to the State of California, and $48.70 plus accruing interest remains due and owing.

11. Eriberto G. Salcedo, while a resident of the State of California during the tax years ending December 1975 and December 1976, incurred personal income tax liability to the State of California, and $206.95 plus accruing interest remains due and owing.

12. Vincent Zarate, while a resident of the State of California during the tax year ending December 1977, incurred personal income tax liability to the State of California, and $124.91 plus accruing interest remains due and owing.

13. On or about September 20, 1978 and/or April 20, 1978, the Board issued a notice to withhold to the Trust pursuant to California Revenue and Taxation Code section 18817. Said notice to withhold enumerated the tax indebtedness of Murphy, Salcedo and Zarate and directed that, pursuant to California Revenue and Taxation Code section 18817, the Trust withhold and transmit to the Board any credits or other personal property or other things of value in the Trust's possession or under their control belonging to Murphy, Salcedo and/or Zarate up to the total amount of tax indebtedness of each of said individuals.

14. On or about January 7, 1980, the Trust notified the Board that it would not honor the notices to withhold pursuant to an advisory opinion from the United States Department of Labor.

15. At the time of the service of the notices to withhold, there existed in the Trust Fund monetary accruals in favor of Murphy, Salcedo and Zarate which the Trust wrongfully failed and refused to pay over to the Board pursuant to said notices to withhold.

16. By reason of the aforesaid failure and refusal of the Trust, the Board has been damaged in a sum equal to the then existing accruals in favor of Murphy, Salcedo and Zarate not to exceed $380.56 plus interest from June 1, 1980.

II
CONCLUSIONS OF LAW

1. There was at the time of the service of the notices to withhold and there continues to be an actual controversy between the parties concerning their respective legal rights and duties.

2. The Trust and the trustees wrongfully failed and refused to honor the levies of the Board upon the Trust in collection of the tax indebtedness of Murphy, Salcedo and Zarate.

3. The Trust and the trustees are obliged and required by law to pay over to the Board all amounts held in the Construction Laborers Vacation Trust for Southern California in favor of Murphy, Salcedo and Zarate sufficient to satisfy the indebtedness of each of said individuals.

4. The Board has been damaged as a direct and proximate result of the Trust's wrongful failure and refusal to honor the Board's levy and garnishment, and the amount of said damage is equal to the accruals existing in favor of

Murphy, Salcedo and Zarate at the time of said levy plus interest.

5. The Trust is legally obligated to honor all future levies by the Board upon the Trust in collection of tax delinquencies of the beneficiaries of the Trust.

6. Sections 18817 and 18818 of the California Revenue and Taxation Code do not conflict with the Employment Retirement Income Security Act of 1974 (ERISA), 29 USC § 1001, et. seq.

7. Sections 18817 and 18818 of the California Revenue and Taxation Code have not been preempted by ERISA.

8. Revenue and Taxation Code sections 18817 and 18818 do not directly or indirectly regulate employee benefit plans and are wholly peripheral to the purposes of ERISA.

9. ERISA itself does not prohibit the Board from levying on the vacation trust fund benefits at issue in this case.

10. The so-called "spendthrift trust" provisions of the subject Trust are not applicable to the Board and the Trust is not immune from the Board's levy.

11. The purposes of ERISA were to assure the equitable character and financial soundness of employee benefit plans and to protect the beneficiaries of the funds from mismanagement of those funds by the fiduciaries of the plans. ERISA protects interstate commerce and the interests of employees and beneficiaries by requiring disclosure and reporting to participants and beneficiaries of financial and other information and by requiring standards of conduct, responsibility and obligation for fiduciaries and by providing remedies, sanctions and access to the Federal Courts.

12. The only anti-alienation provision of ERISA is contained at section 206(d)(1) of ERISA, 29 USC § 1056(d)(1) and applies only to pension plans. It does not apply to

employee welfare benefit plans as defined by 29 USC § 1002(1).

13. On December 28, 1979, the U.S. Department of Labor issued an advisory opinion pursuant to ERISA Procedure 76-1. The opinion quoted portions of ERISA sections 403(c)(1) [29 USC § 1103(c)(1)], 404(a)(1) [29 USC § 1104(a)(1)], and 514 [29 USC § 1144(a)]. Relying on these statutory provisions, the Department of Labor's advisory opinion stated in part:

> "It is the position of the Department of Labor that the process of any state judicial or administrative agency seeking to levy for unpaid taxes or unpaid unemployment insurance contributions upon benefits due a participant or beneficiary under the Plan is preempted under ERISA § 514."

14. The advisory opinion did not distinguish between "employee welfare benefit plans" as defined by 29 USC § 1002(1) and "employee pension benefit plans" as defined by 29 USC § 1002(2).

15. This advisory opinion is clearly erroneous, unreasonable, arbitrary and capricious.

16. This advisory opinion exceeds the scope of ERISA, is not reasonably necessary to effectuate the purpose of ERISA and is inconsistent with the Congressional policy underlying ERISA.

17. Judgment shall be entered in favor of plaintiff, Franchise Tax Board of the State of California, in accordance with the above findings of fact and conclusions of law.

18. This Court has jurisdiction over the subject matter of the within action, and personal jurisdiction over the parties hereto.

19. To the extent any findings of fact set forth above may be deemed to contain a conclusion of law, it is incor-

porated in these conclusions of law. To the extent that these conclusions of law contain any finding of fact, each finding is incorporated in the findings of fact set forth above.

DATED: December 3, 1980.

[Stamp] Manuel L. Real
MANUEL L. REAL
United States District Judge

Appendix D.

Order.

United States Court of Appeals for the Ninth Circuit.

Franchise Tax Board of the State of California, Appellee, v. Construction Laborers Vacation Trust for Southern California, et al., Appellant. No. 80-6080. DC No. 80-2741.

Filed: July 21, 1982.

Before: GOODWIN and TANG, Circuit Judges, and SOLOMON,* District Judge.

Appellee's petition for rehearing is denied.

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*The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Appendix E.

Petition for Rehearing.

In the United States Court of Appeals for the Ninth Circuit.

Construction Laborers Vacation Trust for Southern California, Edward Ashton, Al Atwood, Gary Bronnock, John R. Clarke, R.C. Gallyon, Richard Greenberg, Roger Jaska, William Middleton, George Mattocks, William R. McClain, Nick Orsura, Joe Rivera, Ray M. Wilson, and James Keyes, Appellants, v. Franchise Tax Board of the State of California, Appellee. No. 80-6080.

Filed: July 6, 1982.

Appellee, the Franchise Tax Board of the State of California (hereinafter the Board) petitions for a rehearing to reconsider the judgment entered in this action on June 22, 1982.

This petition is based on the following grounds:

1. In the opinion of counsel, the court has overlooked that fact that the Franchise Tax Board originally brought an action in the state court entitled Complaint for Failure to Honor Garnishment and for Declaratory Relief. The opinion as prepared by this Honorable Court states only that the Franchise Tax Board brought an action for declaratory relief and does not mention that the complaint included a cause of action for failure to honor garnishment.

2. In the opinion of counsel, the majority opinion has overlooked the issue of whether the federal court has jurisdiction of this matter. The issue was not previously raised in this appeal although it was raised by the Board before the district court in a Motion to Remand. The district court denied the Board's Motion to Remand but granted the Board's Motion for Summary Judgment. Thus far, the briefs filed by the parties on

appeal have focused solely on the merits of the case and have not focused on the question of jurisdiction. The purpose of this Petition for Rehearing is to renew the Board's argument that the federal court lacks subject matter jurisdiction over this action.

INTRODUCTION

The Franchise Tax Board's Complaint for Failure to Honor Garnishment and for Declaratory Relief was originally filed in the state court on June 13, 1980. (Docket Item 1, Exh. A, Excerpt of Record, pp. 1-9.) Both causes of action alleged by the Board were based on state law.

On June 25, 1980, appellants, the Trustees of the Construction Laborers Vacation Trust for Southern California (hereinafter Trustees) filed a Petition for Removal (Docket Item 1). They alleged that the federal court had original jurisdiction over this proceeding pursuant to sections 403(c)(1) and 514 of the Employee Retirement Income Security Act of 1974 (hereinafter ERISA). (29 U.S.C. §§ 1103, 1104, 1144.) The Trustees alleged that the action was properly removed to federal court pursuant to 28 U.S.C. § 1441.

On or about September 18, 1980, the Board filed a Motion to Remand pursuant to 28 U.S.C. § 1447(c) on the grounds that the above-entitled action did not involve a claim or right arising under the Constitution, treaties or laws of the United States, nor was there any other basis for federal court jurisdiction over the above-entitled action, since the Board's cause of action against the Trustees arose solely under state law, namely the California Revenue and Taxation Code as construed and applied by the courts of the State of California.

On or about September 26, 1980, the Trustees filed opposition to the Motion to Remand and on or about October

1, 1980, the Board filed a reply memorandum in support of its Motion to Remand. On October 6, 1980, the court denied the Board's Motion to Remand.

ARGUMENT

I

THE FEDERAL COURT DOES NOT HAVE JURISDICTION OVER THE INSTANT PROCEEDING

The Board's causes of action for failure to honor garnishment and for declaratory relief are based solely on state law. Federal law was raised merely as a *defense* to the Board's causes of action.

The Board has the right to sue defendant Trustees for failure to honor garnishment pursuant to California Revenue and Taxation Code sections 18817 and 18818.

Revenue and Taxation Code section 18817 states in relevant part:

> "The Franchise Tax Board may . . . require any employer, person, . . . having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer . . . to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer . . . and to transmit the amount withheld to the Franchise Tax Board at such times as it may designate."

Revenue and Taxation Code section 18818 states:

> "Any employer or person failing to withhold the amount due from any taxpayer and to transmit the same to the Franchise Tax Board after service of a notice pursuant to Section 18817 is liable for such amounts."

The Board has the right to sue defendant Trustees for declaratory relief pursuant to California Code of Civil Procedure section 1060.

In the instant case, there is no way to construe the Board's cause of action as arising under federal law because ERISA does not provide for the Board to bring any kind of lawsuit.

ERISA section 502 (29 U.S.C. § 1132) provides specifically who is empowered to bring a civil suit.

29 U.S.C. § 1132 provides as follows:

"(a) A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (1) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section."

The Board is not a participant, beneficiary, the Secretary of Labor or a fiduciary and could not bring a Complaint for

Failure to Honor Garnishment and for Declaratory Relief under the provisions of ERISA.

The Trustees cited 28 U.S.C. § 1441 as their authority to remove the instant case to the federal court. 28 U.S.C. § 1441 has several subsections. 28 U.S.C. § 1441(a) and 1441(b) both require that the district court must have original jurisdiction of the civil action which is to be removed.

The Trustees alleged in their petition for removal that the subject action involved an employee benefit plan and thus the federal court had original jurisdiction over this action under sections 403(c)(1) and 514 of ERISA.

Section 403(c)(1) of ERISA (29 U.S.C. § 1103(c)(1) states in pertinent part:

> ". . . [T]he assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

Section 514 of ERISA (29 U.S.C. § 1144) states in pertinent part:

> ". . . [T]he provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975."

The Trustees also appeared to rely on the provisions of section 404 of ERISA (29 U.S.C. § 1104) which pertain to fiduciary duties.

It is the position of the Board that 29 U.S.C. §§ 1103(c)(1), 1104 and 1144 are merely alleged defenses to the Board's causes of actions and thus cannot establish subject matter jurisdiction for a federal court.

II

FEDERAL SUBJECT MATTER JURISDICTION MUST BE ESTABLISHED SOLELY BY THE COMPLAINT AND THE FEDERAL COURT MAY NOT LOOK TO THE FEDERAL DEFENSE AVERRED IN AN ANSWER TO ESTABLISH SUBJECT MATTER JURISDICTION

This case should not have been removed to the federal court because the Board relied solely on state law for its causes of action. Federal law was raised as a *defense* to the Board's action.

As this Court said in *Guinasso v. Pacific First Fed. Sav. & Loan Ass'n.* (9th Cir. 1981) 656 F.2d 1364, 1365:

> "A suit can be removed to federal court under 28 U.S.C. § 1441(a) only if it could have been brought there originally. Snow v. Ford Motor Co., 561 F.2d 787, 789 (9th Cir. 1977). . . ."

This Court further stated in *Guinasso*:

> "A substantial proposition of federal law must form 'a direct and essential element of the plaintiff's cause of action.' Smith v. Grimm, 534 F.2d 1346, 1350 (9th Cir.) cert. denied, 429 U.S. 980, 97 S.Ct. 493, 50 L.Ed.2d 589 (1976). . . ." 656 F.2d at 1366.

It is clear that federal jurisdiction must be established solely by the complaint. (*Skelly Oil Co. v. Phillips Petroleum* (1950) 339 U.S. 667, 673-674; *Gully v. First National Bank* (1936) 299 U.S. 109, 113; *Tennessee v. Union & Planters' Bank* (1894) 152 U.S. 454, 459; *La Chemise LaCoste v. Alligator Co., Inc.* (3rd Cir. 1974) 506 F.2d 339, 343-344, cert. den. 421 U.S. 937 rehg. den. 421 U.S. 1006; *Wong v. Bacon* (N.D. Cal. 1977) 445 F.Supp. 1177, 1182.)

The federal claim must not be asserted by way of defense. (*Gully v. First National Bank, supra*, 299 U.S. 109, 113; *Self v. General Motors Corp.* (9th Cir. 1978) 558 F.2d 655, 657; *La Chemise LaCoste v. Alligator Co., Inc., supra*, 506 F.2d 339, 343-344, cert den. 421 U.S. 937, rehg. den. 421 U.S. 1006; *People of the State of California v. General Motors Corp.* (9th Cir. 1970) 431 F.2d 732, 733; *Farmco Stores, Inc. v. Newmark* (D.C. Cal. 1970) 315 F.Supp. 396, 397-398.)

The Board has not asserted any federal subject matter jurisdiction in its Complaint. Thus, the federal court does not have subject matter jurisdiction of the instant case merely because the Trustees relied on the provisions of ERISA for their defense.

In their previously filed opposition to the Board's Motion to Remand, the Trustees argued that the Board had raised the issue of whether ERISA preempts state law adequately in its complaint.

In reality, the Board referred to the ERISA issue by anticipating the Trustees' *defense*. The Board's cause of action was based solely on state law.

The United States Supreme Court has repeatedly and clearly held that in order for a claim to rise "under the Constitution, laws, or treaties of the United States," a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's cause of action. (*Phillips Petroleum Co. v. Texaco Co.* (1974) 415 U.S. 125, 126; *Gully v. First Nat. Bank* (1936) 299 U.S. 109, 112.)

The Supreme Court has also pointed out that the federal question must be disclosed upon the face of the complaint, unaided by the answer and the complaint itself will not serve as a basis of jurisdiction insofar as it goes beyond a statement

of the plaintiff's cause of action and anticipates or replies to a probable defense. (*Phillips Petroleum Co. v. Texaco Co., supra*, at 127-128; *Gully v. First Nat. Bank, supra*, at 113.)

The *Gully* case concerned an action by the State Collector of Taxes against a national bank as agent for its shareholders. The Supreme Court took the case to consider the jurisdiction of the District Court and decided that the District Court did not have jurisdiction. The court said:

> "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. The tax here in controversy if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it." (299 U.S. at 115.)

The New York District Court case of *Nat. Bank of N. America v. Loc. 553 Pension Fund, etc.* (E.D. N.Y. 1978) 463 F.Supp. 636, is very similar to the instant case. In that case, the provisions of ERISA were raised as a defense by the Trustees to an action of a judgment creditor for a pension beneficiary to garnish a portion of the beneficiary's monthly pension benefits. The case was filed in state court and removed to federal court. The District Court granted the motion to remand. The court stated that the "[R]esolution of this motion turns on whether the claim sued upon arises under federal law." (463 F.Supp. at 638.)

The Trustees argued that the case arose under federal law pursuant to ERISA section 502(a)(1)(B). (29 U.S.C. § 1132(a)(1)(B)). The court stated the arguments as follows:

> "To span the apparent gulf between the kind of action contemplated by Section 502(a)(1)(B) and the relief sought by the Bank in this proceeding — garnishment of a portion of Lombardo's monthly pension

benefits — as well as the fact that the Bank, as judgment creditor, hardly qualifies as a 'participant' or 'beneficiary' as those terms are defined in ERISA, see 29 U.S.C. § 1002(7) & (8), . . . the fund offers a two-pronged argument. First, it contends that the order petitioner seeks would necessarily modify Lombardo's right to receive benefits from the Fund and that the proceeding must, therefore, be viewed as one brought 'to clarify the rights of a pensioner to future benefits.' . . . Second, the Fund invokes the familiar rule that a judgment creditor 'stands in the shoes' of the judgment debtor when he seeks to enforce the judgment against property of the judgment debtor held by a third party. . . . Petitioner responds that it does not seek to clarify Lombardo's right to pension benefits but simply to 'intercept' a portion of the benefits currently being paid to him, in order to satisfy the 1975 Civil Court judgment." (463 F.Supp. at 638-639.)

The court rejected the Trustees' argument and stated:

"It is evident here that the Bank's claim, as reflected in its petition to the State court, derives entirely from State, rather than federal, law. Indeed, the relief sought — an order directing the Fund to pay to the Bank a portion of Lombardo's monthly pension benefits — is purely a creation of New York law. See N.Y. CPLR § 5225(b). The Fund's effort to characterize the proceeding as an action brought to clarify a pensioner's right to future benefits from a plan subject to ERISA's substantive provisions — and therefore both within this court's subject matter jurisdiction and calling for a federally-created remedy — is foreclosed by the simple fact that the Bank is neither a 'participant' nor a 'beneficiary,' and in any event falls within the Fund's concession of its obligation, under the terms of the plan, to Lombardo. Certainly, the Bank's claim presupposes Lombardo's right to receive pension benefit

payments; but the Bank's right, if any, to reach those payments stems entirely from the judgment-enforcing remedies provided by the CPLR, and not from the common law notion that a judgment creditor's interest in property held by a third party is coextensive with that of his judgment debtor. [Citations.]" (463 F.Supp. at 639.)

The court concluded by stating:

"Even if the matters raised in defense by the Fund required interpretation of federal law,[4] it is settled that '[a] defense based on federal law . . . will not sustain removal jurisdiction.' "

In a footnote to the decision the court discussed at length the interpretation of federal law question. The court said:

"4. Of course, the fact that federal law may govern certain aspects of a case does not mean that the action arises under federal law for purposes of original or removal jurisdiction. Again, the remedy sought by petitioner is not one provided by Section 502 nor is the proceeding one over which Congress has given the federal courts jurisdiction. The Supreme Court has uniformly rejected the view that federal jurisdiction may be asserted over an action solely on the ground that a property right or interest recognized or governed by federal law is involved or may be affected by the action where, although matters of national policy are implicated, neither the federal government nor a federal entity is a party and no proprietory interest of the federal government is in issue or is likely to be affected by the outcome. Thus where, as here, a claim is founded on State law and does not lie within any specific grant of federal court subject matter jurisdiction, it must be prosecuted in the State courts, and will be governed by State substantive law except to the extent that federal question may emerge in determining the contours of the State claim." (463 F.Supp. at 641.)

The Ninth Circuit case of *People of the State of California v. General Motors Corporation*, 431 F.2d 732 (9th Cir. 1970) held that "a case arises under the law of the United States only if a right created by federal law is an essential element of plaintiff's case." (431 F.2d at 733; accord, *Smith v. Grim*, 534 F.2d 1346 (9th Cir. 1976).) The *General Motors* case noted that there was "no conclusionary language in the complaint alleging that any of plaintiff's federal rights have been violated." (431 F.2d at 733.)

In the instant case, the Board has not alleged that any of its federal rights have been violated and no right created by federal law is an essential element of the Board's case.

III

ALLEGED PREEMPTION IS NOT A BASIS FOR JURISDICTION

The Trustees have previously alleged preemption as a basis for this Court's jurisdiction. However, this argument has been specifically rejected by this Court. In *Guinasso v. Pacific First Fed. Sav. & Loan Ass'n* (9th Cir. 1981) 656 F.2d 1364, 1366, this Court said:

> "Federal preemption is ordinarily a matter to be raised in defense. See Gully v. First Nat'l Bank, 299 U.S. 109, 116, 57 S.Ct. 96, 99, 81 L.Ed. 70 (1936). Taken alone, it is not a basis for removal. Washington v. American League of Professional Baseball Clubs, 460 F.2d 654, 660 (9th Cir. 1972)."

CONCLUSION

For the above stated reasons, the Board respectfully submits that a Petition For Rehearing should be granted and then this case should be remanded to the district court with instructions to remand the action to state court.

DATED: July 2, 1982.

GEORGE DEUKMEJIAN, Attorney General
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EDMOND B. MAMER,
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By /s/ Patti S. Kitching
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Attorneys for Appellee and Petitioner
Franchise Tax Board

Appendix F.

Notice of Appeal to the Supreme Court of the United States. (Supreme Court Rule 10).

United States Court of Appeals for the Ninth Circuit.

Franchise Tax Board of the State of California, Plaintiff, v. Construction Laborers Vacation Trust for Southern California, et al., Defendants. No. 80-6080. DC No. 80-02741-R.

Filed: September 17, 1982.

NOTICE IS HEREBY given that the California Franchise Tax Board, the plaintiff above named, hereby appeals to the Supreme Court of the United States from the final judgment ("opinion") of the United States Court of Appeals, Ninth Circuit, entered in this action on June 22, 1982, (Petition for Rehearing filed July 6, 1982, was denied by the Court of Appeals by "Order" filed July 21, 1982) reversing the judgment of the United States District Court for the Central District of California entered December 4, 1980 in Case Number 80-02741-R.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

DATED: September 16, 1982.

GEORGE DEUKMEJIAN, Attorney General
EDMOND B. MAMER,
PATTI S. KITCHING,
Deputy Attorneys General
By /s/ Patti S. Kitching
PATTI S. KITCHING
Attorneys for Franchise Tax Board

Appendix G.

California Revenue and Taxation Code.

§ 18817.

§ 18817. Franchise Tax Board's notice to withhold and transmit credits, etc., belonging to taxpayer, employer, etc.

The Franchise Tax Board may by notice, served personally or by first-class mail, require any employer, person, officer or department of the state, political subdivision or agency of the state, including the Regents of the University of California, a city organized under a freeholders' charter, or a political body not a subdivision or agency of the state, having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer or to an employer or person who has failed to withhold and transmit amounts due pursuant to Section 18815 or 18818, to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer or the amount of any liability incurred by such employer or person for failure to withhold and transmit amounts due from a taxpayer under this part and to transmit the amount withheld to the Franchise Tax Board at such times as it may designate.

Amended Stats 1978 ch 711 § 3.

Appendix H.

California Revenue and Taxation Code.

§ 18818.

§ 18818. Liability for failing to withhold pursuant to notice

Any employer or person failing to withhold the amount due from any taxpayer and to transmit the same to the Franchise Tax Board after service of a notice pursuant to Section 18817 is liable for such amounts.

Appendix I.

ERISA § 2.

29 U.S.C. § 1001.

TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS

SUBTITLE A—GENERAL PROVISIONS

FINDINGS AND DECLARATION OF POLICY

Sec. 2. (a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interest commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees

with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

Appendix J.

ERISA § 3(1).

29 U.S.C. § 1002(1).

DEFINITIONS

Sec. 3. For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947[1] (other than pensions on retirement or death, and insurance to provide such pensions).

---

[1] 29 U.S.C.A. § 186(c).

Appendix K.

ERISA § 3(2).

29 U.S.C. § 1002(2).

(2) The terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(A) provides retirement income to employees, or

(B) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

Appendix L.

ERISA § 3(3).

29 U.S.C. § 1002(3).

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

Appendix M.

ERISA § 4(a).

29 U.S.C. § 1003(a).

COVERAGE

Sec. 4. (a) Except as provided in subsection (b) and in sections 201, 301, and 401, this title shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

Appendix N.

ERISA § 101(a).

29 U.S.C. § 1021(a).

SUBTITLE B—REGULATORY PROVISIONS

Part I—Reporting and Disclosure

DUTY OF DISCLOSURE AND REPORTING

Sec. 101. (a) The administrator of each employee benefit plan shall cause to be furnished in accordance with section 104(b) to each participant covered under the plan and to each beneficiary who is receiving benefits under the plan—

(1) a summary plan description described in section 102(a)(1); and

(2) the information described in section 104(b)(3) and 105(a) and (c).

Appendix O.

ERISA § 101(b).

29 U.S.C. § 1021(b).

(b) The administrator shall, in accordance with section 104(a), file with the Secretary—

(1) the summary plan description described in section 102(a)(1);

(2) a plan description containing the matter required in section 102(b);

(3) modifications and changes referred to in section 102(a)(2);

(4) the annual report containing the information required by section 103; and

(5) terminal and supplementary reports as required by subsection (c) of this section.

Appendix P.

ERISA § 201(1).

29 U.S.C. § 1051(1).

Part 2—Participation and Vesting

COVERAGE

Sec. 201. This part shall apply to any employee benefit plan described in section 4(a) (and not exempted under section 4(b)) other than—

(1) an employee welfare benefit plan;

Appendix Q.

ERISA § 206(d)(1).

29 U.S.C. § 1056(d)(1).

(d)(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

Appendix R.

ERISA § 301(a)(1).

29 U.S.C. 1081(a)(1).

PART 3 — FUNDING
COVERAGE

Sec. 301. (a) This part shall apply to any employee pension benefit plan described in section 4(a), (and not exempted under section 4(b)), other than —

(1) an employee welfare benefit plan;

Appendix S.

ERISA § 302(a)(1).

29 U.S.C. § 1082(a)(1).

MINIMUM FUNDING STANDARDS

Sec. 302. (a)(1) Every employee pension benefit plan subject to this part shall satisfy the minimum funding standard (or the alternative minimum funding standard under section 305) for any plan year to which this part applies. A plan to which this part applies shall have satisfied the minimum funding standard for such plan for a plan year if as of the end of such plan year the plan does not have an accumulated funding deficiency.

Appendix T.

ERISA § 401(a).

29 U.S.C. § 1101(a).

PART 4 — FIDUCIARY RESPONSIBILITY

COVERAGE

Sec. 401. (a) This part shall apply to any employee benefit plan described in section 4(a) (and not exempted under section 4(b)), other than —

Appendix U.

ERISA § 403(c)(1).

29 U.S.C. 1103(c)(1).

(c)(1) Except as provided in paragraph (2) or (3) or subsection (d), or under sections 4042 and 4044 (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

Appendix V.

ERISA § 404(a)(1)(A).

29 U.S.C. § 1104(a)(1)(A).

FIDUCIARY DUTIES

Sec. 404. (a)(1) Subject to sections 403(c) and (d), 4042, and 4044, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

Appendix W.

ERISA § 501.

29 U.S.C. § 1131.

PART 5—ADMINISTRATION AND ENFORCEMENT

CRIMINAL PENALTIES

Sec. 501. Any person who willfully violates any provision of part 1 of this subtitle, or any regulation or order issued under any such provision, shall upon conviction be fined not more than $5,000 or imprisoned not more than one year, or both; except that in the case of such violation by a person not an individual, the fine imposed upon such person shall be a fine not exceeding $100,000.

Appendix X.

ERISA § 514(a).

29 U.S.C. § 1144(a).

EFFECT ON OTHER LAWS

Sec. 514. (a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

Appendix Y.

ERISA § 514(c)(2).
29 U.S.C. § 1144(c)(2).

EFFECT ON OTHER LAWS

(c) For purposes of this section:

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, *which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.*

Office-Supreme Court, U.S.
FILED
JAN 29 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-695

IN THE

Supreme Court of the United States

October Term, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,
Appellees.

Appeal from the United States Court of Appeals for the Ninth Circuit.

JOINT APPENDIX.

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Jurisdiction Postponed December 13, 1982.

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Documents Contained in Jurisdictional Statement

The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Jurisdictional Statement.

Judgment of the District Court for the Central District of California, filed December 3, 1980 ..... A15

Findings of Fact and Conclusions of Law of the District Court for the Central District of California, filed December 3, 1980 ..... A17

Opinion of the Court of Appeals for the Ninth Circuit, filed June 22, 1982 ..... A 1

Order of the Court of Appeals for the Ninth Circuit denying petition for rehearing, filed July 21, 1982 ..... A24

United States District Court
Central District of California.
Civil Docket.

DATE	NR.	PROCEEDINGS
6-25-80	yd	1. Fld Petn for Removal w/cc Cmplt & Summs.
	yd	2. Fld Bond for undertkng on removal fr Highlands Insurance Co., $500.00, bond #813511
6/26/80	rz	3. Fld notc to cnsl
7-9-80	sb	4. Fld deft's notc of motn to dism memo of P/A in suppt thereof
7-16-80	cg	5. Fld pltfs opp of Franchise Tax Board of the State of Calif. to mot to dism
7-24-80	cg	6 Fld defts reply memo of P/A in suppt of mot to dism
7-30-80	cg	7. Fld Stip & ORD to cont the hrg on mot to dism to 9-15-80 at 10 am
9/5/80	jcd	8. Fld Pltf's suppl oppos to motn to dsms.
9/8/80	jcd	9. Fld Stip and ORD cont'g motn to dsms to 10/6/80, 10 a.m. (NFC)
9/18/80	rz	10. Fld pltf notc of mot & mot fr rem & memo of P/A in suppt thereof retnbl 10/6/80, 10 AM
9/29/80	jcd	11. Fld Plft's exhbt to supplemental oppos of Franchise Tax Board of the State of Calif to motn to dsms.
*9/26/80	jcd	12. Fld Petnrs/defts memo of p/a in oppos to motn to remand.
10/1/80	jcd	13. Fld Pltf's reply memo of p/a in suppt of motn to remand.
10-6-80	cg	14. MIN ORD: crt ords plfs mot for remand denied, pltf mot to dism is cont to 10-20-80 10 am & x-mots for S/J to be hrd on 10-20-80 10 am
10-10-80	cg	LODGED-defts ord denying mot to remand
10-16-80	cg	15. Fld ORD denying mot to Remand to the Superior Court of the State of Calif. (Ent 10-17-80) mld cpys & notcs
*10-15-80	md	16. Fld pltf P&A of Franchise Tax Bd in suppt of S/J
10-20-80	cg	17. MIN ORD: cnsl stip tht mattr may be hrd on x-mots for S/J, hrg hld & crt ords pltfs mot grntd & defts mot for S/J denied, defts mot to dism is denied

DATE	NR.	PROCEEDINGS
10-21-80	cg	18. Fld defts req for findings of fact & concl of law
10-31-80	cg	LODGED-defts prop findgs of fact & concl of law
11-6-80	cg	LODGED-pltfs judgmt LODGED-pltfs prop findngs of fact & concl of law
11-12-80	cg	19. Fld objts to deft Construc Laborers Vacation Trust for So. Calif. to prop findngs of fact & concl of law submt by pltf Franchise Tax board of the stat of calif.
12-3-80	cg	20. Fld Findngs of Fact & Concl of Law as stated w/ in this doc (Ent 12-4-80) cpy to pltf & notcs 21. Fld Judgmt & ORD tht pltfs mot for S/J is grntd, pltf is awarded judgmt against deft inthe amnt of $395.49 as of 11-5-80 w/intrst of $0.083 per dy accruing as of 11-6-80. deft is legally obligated to honor levies by thepltfs upon deft in collection of tax delinquiencies of the beneficiaries of deft Trust Fund (Ent 12-4-80) MD JS -6 cpy to pltf & mld notcs
12-16-80	lw	22. Fld defts' NOTC OF APPEAL frm Jdgmt ent 12-4-80 $70.00 fldng docket fees pd.
12-23-80	cg	23. Fld defts notc of non-designation of rpts rranspt
4-20-81	yd	24. Fld petrs/defts designatn of Clerk's record on appeal
8-24-81	sb	25. Fld pltf-appellee notc of non designation of reporter transcript
	sb	26. Fld notc of non designation of additional clerk record on appeal pltf-appellee
8/9/82	gth	27. Fld notc of hrg on flng & spreading jdmt of C/A cvl retnbl 8/23/82 10 am
8/2/82	gth	Lodged copy of judmt from C/A 9th circuit vacating jdmt & rem. Each party to bear its own costs
8/20/82	gth	28. Fld stip & ORD(R) that the hrg on filng & spreadng jdmt of Crt of Appls be cont to 9/27/82 at 10 am
10/4/82	gth	29. MIN ORD: Crt ORDS jdmt of USCA, 9th Cir vacatng & rem jdmt fld & spread (ENT 10/6/82) Crt rules that jdmt is in favr of Constructn Laborers Vacatn Trust for Southern Calif as prayd & each party is to pay their own costs

Complaint for Failure to Honor Garnishment and for Declaratory Relief.

Superior Court of the State of California for the County of Los Angeles.

Franchise Tax Board of the State of California, Plaintiff, v. Construction Laborers Vacation Trust for Southern California, Edward Ashton, Al Atwood, Gary Bronneck, John Clarke, R. C. Gallyon, Richard Greenberg, Roger Jaska, William Middleton, Louie Bravo, Benjamin T. James, George Mattocks, William R. McClain, Nick Orsura, Joe Rivera, Ray M. Wilson, James Keyes, as trustees and on behalf of Construction Laborers Vacation Trust For Southern California, DOES I to XXX, inclusive, Defendants. No. C326040.

Filed: June 13, 1980.

COMES NOW, the People of the State of California, acting by and through the Franchise Tax Board of the State of California (hereinafter referred to as "the Board"), and for a first cause of action alleges as follows:

FIRST CAUSE OF ACTION

1. The Board is the duly constituted agency of the State of California charged with the enforcement of the Personal Income Tax Law of the State of California and is authorized pursuant to California Revenue and Taxation Code section 18817 to issue Notices to Withhold to enforce collection of unpaid tax liabilities.

2. The Board is informed and believes and on that ground alleges that at all times relevant hereto, defendant, Construction Laborers Vacation Trust for Southern California (hereinafter "Defendant Trust Fund"), is and was at all times mentioned herein, an express trust established on April 14, 1966, by written agreement and Declaration

of Trust, a copy of which is attached hereto as Exhibit "A" and incorporated herein.

3. Plaintiff is informed and believes and on that ground alleges that defendant Trust Fund's existence has been and now is dependent upon the said Agreement and Declaration of Trust and that its principal place of business is in the County of Los Angeles, State of California.

4. The Board is informed and believes and on that ground alleges that at all times relevant hereto, defendants Edward Ashton, Al Atwood, Gary Bronneck, John Clarke, R. C. Gallyon, Richard Greenberg, Roger Jaska, William Middleton, Louie Bravo, Benjamin T. James, George Mattocks, William R. McClain, Nick Orsura, Joe Rivera, Ray M. Wilson and James Keyes, have been duly appointed and acting trustee of the aforesaid Construction Laborers Vacation Trust for Southern California.

5. That the true names of defendants Doe I to Doe XXX inclusive are unknown to plaintiff and plaintiff will ask leave of this court to amend this complaint when their true names and capacities have been ascertained.

6. Jesse Murphy (hereinafter "Murphy"), while a resident of the State of California during the tax year ending December 1976, incurred personal income tax liability to the State of California under the Personal Income Tax Law of the State of California and the following amounts remain due, owing and unpaid:

Year	Tax	Interest	Penalties	Total
December 1976	$37.00	$11.70	-0-	$48.70

Further interest accrues on the total amount of tax and interest bearing penalties from May 31, 1980 at $0.012 per day. A copy of the Certificate of Delinquency setting forth the above amount of indebtedness is attached hereto as Ex-

hibit "B" and is incorporated herein by this reference as if set forth in full.

7. On or about September 20, 1978, the Board issued a Notice to Withhold to defendants pursuant to California Revenue and Taxation Code section 18817. Said Notice to Withhold enumerated the tax indebtedness of Murphy as described in paragraph 6 herein and directed that pursuant to California Revenue and Taxation Code section 18817, defendants withhold and transmit to the Board any credits or other personal property or other things of value in defendants' possession or under their its control belonging to said tax debtor Murphy.

8. On or about March 14, 1979, defendants informed the Board that they would not disburse the funds levied upon to either Murphy or to the Board pending the receipt of an opinion letter from the Administrator, Pension and Welfare Benefit Programs, United States Department of Labor as to whether defendants are permitted to honor said liens under the provisions of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"). A copy of said letter is attached hereto as Exhibit "C" and is incorporated herein by reference as if set forth in full.

9. Eriberto G. Salcedo (hereinafter "Salcedo"), while a resident of the State of California during the tax years ending December 1975 and December 1976, incurred personal income tax liability to the State of California under the Personal Income Tax Law of the State of California and the following amounts remain due, owing and unpaid.

Year	Tax	Interest	Penalties	Payments	Total
Dec. 1975	$232.00	$67.38	$58.00	$189.00	$168.38
Dec. 1976	30.00	8.57	0.00	0.00	38.57

Further interest accrues on the total amount of tax and interest bearing penalties from May 31, 1980 at $0.043 per

day. A copy of the Certificate of Delinquency setting forth the above amount of indebtedness is attached hereto as Exhibit "D" and is incorporated herein by this reference as if set forth in full.

10. On or about September 20, 1977 and/or April 20, 1978, the Board issued a Notice to Withhold to defendants pursuant to California Revenue and Taxation Code section 18817. Said Notice to Withhold enumerated the tax indebtedness of Salcedo as described in paragraph 9 herein and directed that pursuant to California Revenue and Taxation Code section 18817 defendants withhold and transmit to the Board any credits or other personal property or other things of value in defendant's possession or under their its control belonging to said tax debtor Salcedo.

11. On or about January 18, 1978, defendants informed the Board that they would not disburse the funds levied upon to either Salcedo or to the Board pending the receipt of an opinion letter from the Administrator, Pension and Welfare Benefit Programs, United States Department of Labor as to whether defendants are permitted to honor said liens under the provisions of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"). A copy of said letter is attached hereto as Exhibit "E" and is incorporated herein by reference as if set forth in full.

12. Vincent Zarate (hereinafter "Zarate"), while a resident of the State of California during the tax year ending December 1977, incurred personal income tax liability to the State of California under the Personal Income Tax Law of the State of California and the following amounts remain due, owing and unpaid.

Year	Tax	Interest	Penalties	Payments	Total
Dec. 1977	$586.00	$24.59	$28.32	$514.00	$124.91

Additional penalty on the total unpaid tax accrues from May

31, 1980, at $0.012 per day until April 15, 1981. Additional interest on the total unpaid tax and interest bearing penalties accrues from May 31, 1980, at $0.028 per day. A copy of the Certificate of Delinquency setting forth the above amount of indebtedness is attached hereto as Exhibit "F" and is incorporated herein by this reference as if set forth in full.

13. On or about September 20, 1978, the Board issued a Notice to Withhold to defendants pursuant to California Revenue and Taxation Code section 18817. Said Notice to Withhold enumerated the tax indebtedness of Zarate as described in paragraph 12 herein and directed that pursuant to California Revenue and Taxation Code section 18817 defendants withhold and transmit to the Board any credits or other personal property or other things of value in defendants' possession or under their its control belonging to said tax debtor Zarate.

14. On or about March 14, 1979, defendants informed the Board that they would not disburse the funds levied upon to either Zarate or to the Board pending the receipt of an opinion letter from the Administrator, Pension and Welfare Benefit Programs, United States Department of Labor as to whether defendants are permitted to honor said liens under the provisions of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"). A copy of said letter is attached hereto as Exhibit "G" and is incorporated herein by reference as if set forth in full.

15. On or about January 7, 1980, defendants notified the Board that the defendants would not honor the levies made upon them by the State of California pursuant to an Advisory Opinion from the United States Department of Labor. A copy of said notification and its exhibit, the Advisory Opinion are attached hereto as Exhibit "H" and are incorporated herein by reference as if set forth in full.

16. The Board is informed and believes and on that ground alleges that at the time of the service of the Notice to Withhold referred to in paragraphs 7, 10, and 13 of this complaint, there existed in the said defendant Trust Fund monetary accruals in favor of Murphy, Salcedo and Zarate, which said defendants wrongfully failed and refused to pay over to the Board pursuant to said Notice to Withhold. The Board does not know the exact amount of the said accruals at this time and prays leave to amend this complaint to allege said amount when it has been ascertained through discovery.

17. By reason of the aforesaid failure and refusal of said defendants, the Board has been damaged in a sum equal to the then existing accruals in favor of Murphy, Salcedo and Zarate not to exceed $380.56 plus interest from June 1, 1980.

SECOND CAUSE OF ACTION

18. The Board hereby incorporates by reference all the allegations contained in paragraphs 1 through 17 of the First Cause of action.

19. There was at the time of the levies alleged above and continues to be an actual controversy between the parties concerning their respective legal rights and duties. The Board contends that defendants are obligated and required by law to pay over to the Board all amounts held in the Construction Laborers Vacation Trust for Southern California in favor of the Board's delinquent taxpayers. On the other hand, defendants contend that section 514 of ERISA preempts state law and that the trustees lack the power to honor the levies made upon them by the State of California.

20. The above described dispute between the parties has continued from the dates of the service of the Notice of Withhold alleged above and will continue into future

years in that the Board will continue to attempt levy and garnishment of the defendant Trust Fund for the collection of the tax obligations of defendant's tax debtor beneficiaries and defendants will continue to refuse to honor the Board's levies in this regard. Accordingly, a declaration by this court of the parties' respective rights is required to fully and finally resolve this controversy.

WHEREFORE, plaintiff prays judgment as follows:

1. That defendants wrongfully failed and refused to honor the levies of the Board upon defendant Trust Fund in collection of the tax indebtedness of beneficiaries Murphy, Salcedo and Zarate;

2. That the Board has been damaged as a direct and proximate result of defendants' wrongful failure and refusal to honor the Board's levy and garnishment and that the amount of said damage is equal to the accruals existing in favor of Murphy, Salcedo and Zarate, at the time of said levy plus interest;

3. That the Board be awarded judgment against defendants in a sum equal to the amount of said accruals as hereafter determined to exist through discovery;

4. That the court declare defendants legally obligated to honor all future levies by the Board upon defendant Trust Fund in collection of tax delinquencies of the beneficiaries of defendant Trust Fund;

5. That plaintiff be awarded costs of suit herein and such other relief as this court deem just and proper.

GEORGE DEUKMEJIAN, Attorney General
EDMOND B. MAMER,
PATTI S. KITCHING,
Deputy Attorneys General
By /s/ Patti S. Kitching
PATTI S. KITCHING
Attorneys for Plaintiff

EXHIBIT "A".

The Construction Laborers Vacation Trust
for Southern California.

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AGREEMENT AND DECLARATION OF TRUST ESTABLISHING THE CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA

ARTICLE I—PARTIES TO AGREEMENT

This Agreement and Declaration of Trust is made and entered into in the County of Los Angeles, State of California, upon the considerations hereinafter set forth, by and between the following parties:

1.01 Associations:

(a) Southern California Chapter of the Associated General Contractors of America.

(b) Home Builders Association of Los Angeles, Orange and Ventura Counties, successor to Home Builders Institute, Inc.

(c) Engineering and Grading Contractors' Association of California, Inc.

(d) Building Contractors' Association of California Inc.

1.02 Union:

Southern California District Council of Laborers for and on behalf of the District Council and its affiliated Local Unions of the International Hod Carriers, Building and Common Laborers' Union of America, A.F.L.-C.I.O. Subsequent to the execution of the Collective Bargaining Agreement, described in Section 3.01(a), International Hod Carriers, Building and Common Laborers' Union of America changed its name to "Laborers' International Union of North America." Any reference herein to "International

Hod Carriers, Building and Common Laborers' Union of America" shall be deemed to likewise refer to "Laborers' International Union of North America."

1.03 Original Trustees:

(a) Union Trustees:
James V. Flores
Ray Waters
Ray Mendoza
Joseph Y. Murdock
Ray M. Wilson
Don E. Graves
Nick Orsua
S. J. Hibbler

(b) Employer Trustees:
James H. Crowell
Herb W. Smith
R. C. Gallyon
Peter E. Johnson
Reed Sprinkel
E. M. Barker
R. A. Alsweet
Syd Carnine

ARTICLE II—REASONS FOR AGREEMENT

2.01 The Union and the Associations have entered into collective bargaining agreements which provide, among other things, for the establishment of a fund for the payment of paid vacations.

2.02 The Union and the Associations desire to establish a Vacation Fund as a Trust Fund for receiving contributions and to provide vacation benefits for eligible employees.

2.03 The Union and the Associations desire to set forth the terms and conditions under which the said Fund is to be established and administered; and to set forth the power and duties of the Trustees and nature of the benefits to be provided; and to set forth their agreement respecting such other matters as are pertinent to the Vacation Fund.

ARTICLE III—DEFINITIONS

Unless the context or subject matter otherwise requires, the following definitions shall govern in this Agreement:

3.01 The term "Collective Bargaining Agreements" includes:

(a) The so-called Laborers Southern California Master-Labor Agreement dated June 1, 1965, between the Associations and the Union, and the amendments thereto.

(b) Any other collective bargaining agreements between the International Hod Carriers, Building and Common Laborers Union, District Council or its Local Union affiliates and any individual employer or employer association which provide for the making of employer contributions to this Fund, subject to approval of the Board of Trustees as herein provided.

(c) Any extensions, amendments, modifications or renewals of any of the above described agreements, or any substitute or successor agreements to them which provide for the making of employer contributions to this Fund.

3.02 The term "Individual Employer" means any individual employer (including any individual, partnership, corporation, contractor, joint venture or other entity) who is required by any of the Collective Bargaining Agreements to make contributions to the Vacation Fund or who in fact makes one or more contributions to the Fund.

3.03 The term "Employee" means any employee of an individual employer who performs one or more hours of work covered by any of the Collective Bargaining Agreements. Individual employers who are self-employed, whether operating as sole proprietorships or partnerships, are not eligible to be and shall not be included as participants or beneficiaries of this Plan.

3.04 The term "Union" or "District Council" means the Southern California District Council of Laborers.

3.05 The term "Local Union" means any local union of the International Hod Carriers, Building and Common Laborers Union of America, A.F.L.-C.I.O. in the following Southern California Counties: Imperial, Inyo, Kern, Los

Angeles, Mono, Orange, Riverside, San Bernardino, San Luis Obispo, Santa Barbara and Ventura.

3.06 The term "Trustee" means any natural person designated as Trustee pursuant to ARTICLE V hereof. "Employer Trustees" are the original eight Trustees appointed by the Associations, and their successors. "Union Trustees" are the original eight Trustees appointed by the Union, and their successors.

3.07 The terms "Board of Trustees" or "Board" mean the Board of Trustees established by this Trust Agreement.

3.08 The terms "Vacation Fund" or "Fund" mean the trust fund created and established by this Trust Agreement.

3.09 The terms "Vacation Plan" or "Plan" mean any Vacation Plan created pursuant to the Collective Bargaining Agreements and this Trust Agreement and any modification, amendment, extension or renewal of said Plan.

3.10 The term "Trust Agreement" or "Agreement and Declaration of Trust" means this agreement and any modification, amendment, extension or renewal thereof.

3.11 The term "Contribution" means the payment made or to be made to the Fund by any individual employer under the provisions of any of the Collective Bargaining Agreements.

ARTICLE IV—CREATION OF TRUST

4.01 There is hereby created the Construction Laborers Vacation Trust for Southern California, which shall consist of all contributions required by the Collective Bargaining Agreements to be made for the establishment and maintenance of the Plan, and all interest, income and other returns thereon of any kind whatsoever, and any other property received or held by reason of or pursuant to this Trust.

4.02 The Fund shall have its principal office in the County of Los Angeles, State of California.

4.03 No employee or beneficiary shall be entitled to receive any part of the contributions made or required to be made to the Fund except as provided by the Plan.

4.04 The Board of Trustees shall have the continuing supervision, control and direction of the Fund for the uses, purposes and duties set forth in this Trust Agreement and be vested with all right, title and interest to it except as the right to certain monies may vest in employees, as more particularly hereinafter set forth. The Fund shall be administered by the Board of Trustees for the exclusive benefit of employees and the beneficiaries of such employees. Notwithstanding anything to the contrary contained in this Trust Agreement or in the Plan, any modification, amendment, extension or renewal hereof or of the Plan, no portion of the Fund shall at any time revert to, or be recoverable by, any of the Associations, any individual employer, the Union, or any Local Union, or be used for, or diverted to, purposes other than for the exclusive benefit of employees or their beneficiaries under the Plan, and the payment of the administrative expenses of the Fund and the Plan, or refund of erroneous payments.

4.05 Neither the Associations, any individual employer, the Union, any Local Union, any employee, nor beneficiary under the Plan nor any other person shall have any right, title or interest in or to the Fund other than as specifically provided in this Trust Agreement. Neither the Fund nor any contributions to the Fund shall be in any manner liable for or subject to the debts, contracts or liabilities of any of the Associations, any individual employer, the Union, any Local Union, or any employee or beneficiary.

4.06 Each employee or beneficiary under the Plan is hereby restrained from selling, transferring, anticipating, assigning, hypothecating or or otherwise disposing of his benefits hereunder or any other right or interest under the Plan, and the Board of Trustees shall not recognize, or be required to recognize, any such sale, transfer, anticipation, assignment, hypothecation or other disposition. Any such benefit, right or interest shall not be subject in any manner to voluntary transfer or transfer by operation of law or otherwise, and shall be exempt from the claims of creditors or other claimants and from all orders, decrees, garnishments, executions or other legal or equitable process or proceedings to the fullest extent permissible by law.

4.07 Neither the Association nor any officer, agent, employee or committee member of the Associations shall be liable to make contributions to the Fund or be under any other liability to the Fund or with respect to the Plan, except to the extent that he or it may be an individual employer required to make contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he may incur liability as a Trustee as hereinafter provided. The liability of any individual employer to the Fund, or with respect to the Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall be or it be liable or responsible for any portion of the contributions due from other individual employers with respect to the operations of such individual employers. The individual employers shall not be required to make any further payments or contributions to the cost of operation of the Fund or of the Plan, except as may be hereafter provided in the Collective Bargaining Agreements.

4.08 Neither the Associations, any individual employer, the Union, any Local Union, nor any employee shall

be liable or responsible for any debts, liabilities or obligations of the Fund or the Trustees.

4.09 Neither the Union, Local Unions, Associations nor the individual employers, nor the Trustees, nor any officer, agent nor member of any of them, shall be personally liable for the benefits provided under this Agreement; and all such benefits shall be payable and/or collectible only out of the assets of the Fund. An employee whose claim has been denied, in whole or in part, must look exclusively to the Trust Fund for satisfaction of his claim and may not bring legal action against any other person, firm or corporation.

ARTICLE V—TRUSTEES

5.01 The Fund and Plan shall be administered by a Board of Trustees consisting of sixteen Trustees, eight of whom shall be designated "Employer Trustees" and eight of whom shall be designated "Union Trustees."

5.02 The Employer Trustees shall be appointed in writing by the Associations, which Associations are irrevocably designated by each individual employer as his or its attorneys-in-fact for the purpose of appointing and removing Trustees and successor Trustees.

5.03 The Union Trustees shall be appointed by majority vote of those delegates to the District Council who represent Local Unions which are affiliated with the District Council and which have collective bargaining agreements with individual employers, which agreements provide for the making of employer contributions to this Fund; and the Trustees so appointed shall be selected from the said delegates representing said participating Local Unions on the District Council. Each Union, present or future party to this agreement, whether or not a member of the District Council, hereby irrevocably designates such delegates to the District Council as its attorneys-in-fact for the purpose of appointing

and removing Trustees and successor Trustees. Notification of any such appointment shall be given in writing to the Trustees by the District Council; and the Trustees may accept such notification as official and may rely thereon without inquiring as to compliance with the foregoing provisions.

5.04 The names of the original Trustees are set forth in ARTICLE I of this Agreement, and the signatures of such Trustees to this Trust Agreement shall constitute their acceptance of office and agreement to act under and be subject to all of the terms and conditions of this Agreement.

5.05 Successor Trustees appointed pursuant hereto likewise shall sign this Trust Agreement, or a counterpart thereof, and such signature shall constitute their acceptance of the office and agreement to act under and be subject to all of the terms and conditions of this Trust Agreement.

5.06 Each original Trustee, and each successor Trustee, shall serve until his death, incapacity, resignation or removal, as herein provided. Any retiring Trustee shall forthwith turn over to the remaining Trustees any and all records, books, documents, monies and other property in his possession owned by the Trust or incident to the administration of the Trust.

5.07 Any Employer Trustee may be removed at will, with or without cause, by the Associations. Any Union Trustee may be removed at will, with or without cause, by majority vote of those delegates to the District Council who are vested with the authority of appointment.

If a Trustee shall be absent from two consecutive trustee meetings, the Board of Trustees shall have the right, but shall not be required, to request the removal of such Trustee. In such event, such Trustee shall be removed by the party

vested with power of removal and a successor Trustee appointed.

Removal of a Trustee shall be made in writing in the same manner as an appointment of a Trustee.

5.08 A Trustee may resign and become and remain fully discharged from further duty or responsibility hereunder upon giving thirty (30) days' written notice to the remaining Trustees and to the party which shall have appointed or selected such Trustee.

5.09 Whenever a vacancy shall occur in the Board of Trustees, whether by death, removal, resignation or otherwise, the party by whom such vacancy was originally filled shall forthwith designate a successor Trustee. Appointment of a successor Trustee shall be evidenced in the same manner as appointment of original Trustee. Any successor Trustee appointed by and in accordance with the foregoing provisions shall be vested with all rights, power and duties of a Trustee hereunder with like effect as if originally named as a Trustee in this instrument. The powers of the remaining Trustees to act as herein provided shall not be impaired or limited in any way pending the designation of a successor Trustee to fill any vacancy.

5.10 The procedures through which the Employer Trustees are to be appointed, removed or replaced by the Association are to be determined exclusively by such Associations. If such procedures provide for the appointment, removal or replacement of one or more Trustees by a particular Association or group thereof, the Fund shall be advised in writing by the Associations as to which of the Associations has such right as to which Employer Trustee. Should any such particular Association no longer be a party to this Trust and to the Collective Bargaining Agreements, then the remaining Associations shall advise the Fund in

writing which of the remaining Associations then has such right as to which Trustee.

5.11 The officers of the Board of Trustees shall be a Chairman and a Secretary-Treasurer, selected by the Trustees from among themselves. One officer shall be an Employer Trustee and the other officer shall be a Union Trustee. Term of office shall be for a period of one year, except that the term of the first offices shall expire on June 30, 1966. Offices shall alternate as between Employer and Union Trustees: that is, if the first Chairman shall be an Employer Trustee, the next Chairman shall be a Union Trustee, etc.

*5.12 The Chairman shall be responsible for the conduct of the meeting. The Secretary-Treasurer shall keep minutes or records of all meetings, proceedings and acts of the Trustees, and shall make same available to all Trustees. The Chairman and Secretary-Treasurer shall jointly execute written instruments authorized by the Trustees, and shall jointly sign checks drawn on the Fund. However, the Board of Trustees may designate an alternate for the Chairman and an alternate for the Secretary-Treasurer, which alternate shall be chosen from the same Trustee group as the officer for whom he serves as alternate. In the event of the absence or disability of such officer, instruments and checks may be signed by his alternate.

Notwithstanding the foregoing, the Trustees may authorize the signing of the vacation benefit checks issued pursuant to Article IX by use of a facsimile plate bearing the signatures of the officers otherwise authorized to execute checks drawn on the fund, subject to such limitation on the amount of individual checks as the Trustees may, from time to time, determine by resolution. The Administrator shall

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*Amended June 30, 1966.

furnish the bank on which such checks are drawn, with a copy of any such resolution which shall be deemed sufficient authorization for the bank to accept and honor vacation benefit checks signed by such facsimile plate. This authority for the use of facsimile signatures is expressly restricted to said vacation benefit checks and shall not apply to other checks issued by the Board of Trustees.

5.13 Five Trustees, present in person at any meeting, shall constitute a quorum for the transaction of business, provided that not less than two Employer Trustees and not less than two Union Trustees shall be present.

5.14 (a) An annual meeting shall be held each year for the purpose of electing officers for the ensuing year. Date of annual meeting shall be fixed by resolution of the Board of Trustees.

(b) Regular or periodic meetings may be held at such time or times as may be established by resolution of the Trustees.

(c) Special meetings may be called by the Chairman or Secretary-Treasurer or by any two other Trustees, by giving to each Trustee at least five (5) days' written notice of the time and place of such meeting; or may be held without notice if all Trustees consent in writing.

(d) All meetings shall be held in Los Angeles County, California, at such place as shall be designated by resolution of the Trustees.

5.15 Unless otherwise provided in this Agreement, all decisions of the Trustees shall be made by the majority vote of the Trustees present at the meeting at which such vote is taken. However, Employer Trustees and Union Trustees shall have the right to cast an equal number of votes, to wit, eight votes for Employer Trustees and eight votes for Union Trustees, whether or not an equal number of Employer

Trustees and Union Trustees are present. In the event the number of Employer Trustees or Union Trustees present at the meeting are less than eight, each Trustee shall be vested with additional voting power in an amount sufficient to give to the group a total voting power of eight votes. For example, by way of illustration, if there are present at a meeting four Union Trustees and six Employer Trustees, there will nevertheless be a total voting power of sixteen votes, eight of which shall be vested in the Union Trustees, two votes each; and eight of which shall be vested in the Employer Trustees, one and one-third votes each.

5.16 Action by the Trustees may also be taken by them without a meeting provided that such action is evidenced by an instrument in writing to which all of the Trustees shall consent by unanimous written concurrence.

5.17 Action in Event of Deadlock:

(a) In the event the Trustees cannot act with respect to any question or resolution presented to the Trustees for their decision because of a tie vote, then an impartial umpire to cast the deciding vote shall, if possible, be chosen forthwith by the Trustees. If such Trustees cannot at such time choose an impartial umpire, then the Chairman and the Secretary shall attempt to select such impartial umpire, and if such Chairman and Secretary cannot agree on an impartial umpire within seventy-two (72) hours after the adjournment of the meeting at which the tie vote occurred, then either group of Trustees may write to or petition the District Court of the United States, of the Southern District of California, Central Division, for the appointment of such an impartial umpire.

(b) Upon the impartial umpire being so chosen or appointed, a meeting of the Trustees shall be held as soon as practicable, which shall be attended by such umpire, and

he shall at such time hear any evidence or arguments presented by either group of Trustees upon the question or resolution upon which the tie vote has occurred, and such umpire may, if he desires, make any inquiries from the Trustees with respect to any information deemed by him to be competent, relevant, or material to the question, and if such information is not then available, it shall be furnished to such umpire, by the Chairman and the Secretary jointly, as soon as practicable. Such impartial umpire shall then as soon as practicable, and in any case, within fourteen (14) days after the meeting at which such umpire shall have been present and heard the evidence and arguments, by written instrument cast his vote for or against the question or resolution upon which the tie has occurred. Such umpire shall specify in writing his reasons for casting such vote. A copy of such written vote of the umpire shall be delivered by him to the Chairman and to the Secretary of the Trustees. The decision of the impartial umpire shall be final and binding upon the Trustees, the parties and the beneficiaries of this Agreement and the Plan.

(c) The cost and expense incidental to any appointment of an umpire, and the holding of proceedings before him including the fee, if any, for such umpire, shall be a proper charge against the Fund, and the Trustees are authorized and directed to pay such charges, except that each party shall pay any expenses incurred by it for attorneys' fees, consultants, witnesses, traveling to and from the hearing and all similar personal expenses.

(d) No matter in connection with the interpretation or enforcement of any collective bargaining agreement shall be subject to arbitration under this section.

5.18 The Board of Trustees may reimburse a Trustee with respect to expenses incurred by him in connection with the activities or business or the Fund, if the incurring of

such expenses was approved in advance by the Board of Trustees. The Trustees may also provide for reasonable compensation to be paid Trustees.

5.19 Liability of Trustees:

(a) The trustees may, but are not required to, secure the advice of counsel or consultants on any matter under consideration. Acting upon such advice shall be full protection and justification to the Trustees for anything suffered, done or admitted to be done in good faith and in accordance with and in reliance on such opinion, and the Trustees shall not be liable therefor.

(b) The Trustees and each individual Trustee shall not be liable for any error of judgment or for any loss arising out of any act or omission in the execution of their duties so long as they act in good faith and without gross negligence; nor shall any Trustee, in the absence of his own wilful misconduct, bad faith or gross negligence, be personally liable for the acts or omissions (whether performed at the request of the Trustees or not) of any other Trustee, or of any agent or attorney elected or appointed by or acting for the Trustees. The Fund shall exonerate, reimburse and save harmless the Trustees, individually and collectively, against any and all liabilities and reasonable expenses arising out of their trusteeship, except (as to the individual Trustee or Trustees directly involved) for expenses and liabilities arising out of wilful misconduct or gross negligence. No expense shall be deemed reasonable under this section unless and until approved by the Board of Trustees.

(c) The Trustees shall incur no liability and shall be fully protected in acting upon any instrument, certificate, or paper believed by them to be genuine and to be signed or presented by the proper person or persons, and shall be under no duty to make any investigation or inquiry as to

any statement contained in any such writing, but may accept the same as conclusive evidence of the truth and accuracy of the statements therein contained.

(d) Neither the Associations, individual employers, the Union or Local Unions nor any of them shall be liable in any respect for any of the obligations or acts of the Trustees even though such Trustees may be associated with, employed by, or otherwise connected with an Association, individual employer, Union or Local Union.

(e) Neither the Trustees nor any individual or successor Trustee shall be personally answerable or personally liable for any liabilities or debts of the Fund contracted by them as such Trustees, or for the nonfulfillment of contracts, but the same shall be paid out of the Fund, and the Fund is hereby charged with a first lien in favor of such Trustees for his or their security and indemnification against any liability of any kind which the Trustees or any of them may incur hereunder; provided, however, that nothing herein shall exempt any Trustee from liability arising out of his own wilful misconduct, bad faith or gross negligence, or entitle such Trustee to indemnification for any amounts paid or incurred as a result thereof.

5.20 Functions, Power and Duties of Trustees:

(a) The Associations, individual employers, and the Union and Local Unions irrevocably grant Power of Attorney to the Trustees now in office or subsequently appointed in accordance with the provisions of this Agreement and Declaration of Trust to administer said Fund and, as the representative of such parties, to exercise rights granted to the Trustees under Section 9.01.

(b) The Board of Trustees shall have the power to administer the Fund and to administer and maintain the Plan in effect, having and performing all powers and duties rea-

sonably necessary to maintain and operate the Plan in such a way as to accomplish its objectives. The detailed basis on which benefits are to be paid are hereinafter set forth in ARTICLE IX hereof. The Board of Trustees may at any time, and from time to time, amend or modify such Plan. In no event shall any amendment or modification of the Plan cause or result in any portion of the Fund reverting to, or being recoverable by, any of the Associations, any individual employer, the Union, or any Local Union, or cause or result in the diversion of any portion of the Fund to any purpose other than the exclusive benefit of employees or their beneficiaries under the Plan and the payment of the administrative expenses of the Fund and the Plan, or refund or erroneous payments.

(c) The Trustees shall deposit all monies received by them in such bank or banks as they may select for that purpose, providing such banks are members of the Federal Reserve System. All checks, drafts, vouchers or other withdrawals of funds from the account or accounts of the Trust Funds shall be countersigned by two Trustees, one Employer Trustee and one Union Trustee, who shall be the Chairman and the Secretary-Treasurer or alternates designated for such purpose.

5.21 Without limitation of the provisions of Section 5.20(b) of this Article, the Board of Trustees shall have power:

(a) To pay or cause to be paid out of the Fund the reasonable expenses incurred in the establishment of the Fund and the Plan.

(b) To establish and accumulate such reserve funds as may be adequate in the discretion of the Board to provide for administration expenses and other obligations of the Fund, including the maintenance in effect of the Plan.

(c) To employ, engage or contract with, such executive, consultant, actuarial, accounting, investment, administrative, clerical, secretarial and legal personnel and other employees or assistants, as may be necessary in connection with the administration of the Fund and the Plan and to pay or cause to be paid, out of the Fund, the compensation and necessary expenses of such personnel and assistants and the cost of office space, furnishings and supplies and other essentials required in such administration.

(d) To incur and pay or cause to be paid out of the Fund any other expense reasonably incidental to the administration of the Fund or the Plan.

(e) To compromise, settle, or release claims or demands, in favor of or against the Fund on such terms and conditions as the Board may deem desirable; provided, however, that this clause shall not excuse any violation of any of the Collective Bargaining Agreements.

(f) The Trustees shall have the power to invest and reinvest any funds which, in their sole and absolute discretion, they consider not required for current expenditures, such funds to be invested only in such investments as are legal for investment of trust funds under the laws of the State of California. However, no investments shall knowingly be made in the securities, obligations or properties of any Association, individual employer, Union or Local Union as defined herein. The Trustees may sell or otherwise dispose of such investments at any time and from time to time as they in their discretion determine.

(g) To enter into contracts to provide any or all of the benefits specified in the Plan, to terminate, modify or renew any such contracts or policies subject to the provisions of the Plan, and to exercise and claim all rights and benefits granted to the Board or the Fund by any such contracts.

(h) With or without any of the contracts mentioned in paragraph (g) of this Section, to pay or cause to be paid all or any part of the benefits provided in the Plan, to the persons entitled thereto under the Plan, and in accordance with the terms and provisions of the Plan.

(i) To purchase, sell, exchange, lease, convey or otherwise dispose of or to cause to be purchased, sold, exchanged, leased, conveyed or otherwise disposed of, any property of any kind forming a part of the Fund upon such terms as it may deem proper and to execute and deliver or cause to be executed and delivered, any and all instruments of conveyance or transfer in connection therewith.

(j) To construe the provisions of this Trust Agreement and the Plan and any such construction adopted by the Board in good faith shall be binding upon any and all parties or persons affected thereby.

(k) To pay or cause to be paid any and all real or personal property taxes, income taxes, or other taxes or assessment of any or all kinds levied or assessed upon or with respect to the Fund or the Plan.

(l) To maintain or cause to be maintained, on a current basis, all actuarial data, records and information in connection with the administration of the Plan and to cause the books and records to be checked and evaluated annually, or more often if the Board so determines, by the Fund consultant-actuary or consultant-actuaries as the case may be, whose report shall be available for inspection by interested persons at reasonable times and upon proper notice, at such place or places as may be designated by the Board; and the Board shall have the right to rely upon all such reports and records.

(m) To prepare or cause to be prepared such periodic reports concerning the affairs of the Fund and the Plan, as

the Board may deem advisable, and to furnish such reports to such persons as the Board may deem advisable.

(n) To adopt and prescribe reasonable rules and procedures, which shall not be inconsistent with the provisions of this Trust Agreement or of the Plan, governing the reporting of contributions and any and all other matters in connection with the Fund and the Plan.

(o) To exercise and perform any and all of the other powers and duties specified in this Trust Agreement or the Plan.

(p) To delegate any of their ministerial powers or duties to any one or more of the remaining Trustees, or to any agent or employee engaged by the Trustees. To delegate to an Investment Counselor the power to invest and reinvest the Trust Funds in accordance with provisions of paragraph 5.21(f).

(q) To coordinate its activities in the administration of the Fund and the Plan with the administrative activities of the Boards of Trustees of other employee benefit plans or trusts established or to be established for building tradesmen in California to such extent as may be necessary or desirable to minimize costs, eliminate unnecessary bookkeeping and other expenses for the individual employers and avoid or eliminate duplicating employer contributions with relation to the same employee.

(r) To enter into reciprocal arrangements with trustees of similar plans in the State of California that are or may be established by local unions of the Laborers' International Union of North America A.F.L.-C.I.O. for the purpose of providing continuing participation in the Plan for employees who may work a portion of the time in the jurisdiction of such other plans; and for employees regularly employed in the jurisdiction covered by this Plan; such arrangements to

be by transfer of credits or contributions or such other system as the Trustees shall determine which shall be compatible with equitable principles and in accordance with sound actuarial and accounting principles and practices.

(s) To employ legal counsel, it being understood that the Trust Fund shall be represented by joint counsel, one selected by the Union Trustees and one selected by the Employer Trustees, at such rate of compensation as may be determined appropriate by the Trustees.

5.22 The Board of Trustees shall procure fidelity bonds and such other bonds as may be required by law for each Trustee or other person authorized to receive, handle, deal with or draw upon the monies in the Fund for any purpose whatsoever, said bonds to be in such reasonable amount and to be obtained from such source as the Board shall determine. The cost of such bonds shall be paid out of the Fund.

5.23 The Board of Trustees shall maintain suitable and adequate records of and for the administration of the Fund and the Plan. The Board may require the Associations, any individual employer, the Union, any Local Union, an employee or any other beneficiary under the Plan to submit to it any information, data, report or documents reasonably relevant to and suitable for the purposes of such administration; provided, however, that the Union and the Local Unions shall not be required to submit lists of membership. The parties agree that they will use their best efforts to secure compliance with any reasonable request of the Board for any such information, data, report or documents. The Trustees may, at reasonable times and during normal business hours, audit or cause the audit or an inspection of the records of any individual employer which may be pertinent in connection with said contributions and/or reports and insofar as same may be necessary to accomplish the purpose

of this Trust Agreement. In the event such audit or inspection shall disclose that the individual employer is in default in the payment of his contributions to the Fund, or if such audit or inspection shall be made by reason of the failure of the individual employer to submit reports as required by the Trustees, the individual employer shall, upon demand, pay to the Fund the actual costs of such audit or inspection.

5.24 The books of account and records of the Board of Trustees, including the books of account and records pertaining to the Fund shall be audited at least once a year by a qualified certified public accountant to be selected by the Board. The Board shall also make other reports required by law. A statement of the results of the annual audit shall be available for inspection by interested persons at the principal office of the Fund and at such other suitable place as the Board may designate from time to time. Copies of such statement shall be delivered to the Associations, the Union and each Trustee within fifteen (15) days after the statement is prepared.

5.25 The Trustees shall have the power in their own names or otherwise, as in their discretion may be deemed necessary or desirable, to demand and enforce the prompt payment of contributions to the Fund, including payments due to delinquencies as provided in Section 6.04, and to assert and enforce all priorities, lien rights, and other claims or rights with respect to any contributions or payments belonging to the Fund, this trust or any of its beneficiaries, including the rights of file priority and other claims in bankruptcy. If any individual employer defaults in the making of such contributions or payments and if the Board consults or causes to be consulted legal counsel with respect thereto, or files or causes to be filed any suit or claim with respect thereto, there shall be added to the obligation of the individual employer who is in default, reasonable attorneys'

fees, court costs and all other reasonable expenses incurred in connection with such suit or claim, including any and all appellate proceedings therein.

ARTICLE VI—CONTRIBUTIONS

6.01 Contributions shall be paid into the Fund in such manner and with such reports as the Board of Trustees may prescribe.

6.02 Contributions to the Fund shall be due commencing June 1, 1965, for work on or after June 1, 1965, and shall be payable in the County of Los Angeles, California, in regular monthly installments starting on or before July 15, 1965, and continuing from month to month thereafter subject to the provisions of the Collective Bargaining Agreements. The contributions payable on or before July 15, 1965, shall include all payments which have theretofore accrued for work performed during the period from June 1, 1965, up to the close of the individual employer's payroll period ending closest to the last day of that month, and thereafter each monthly contribution shall include all payments which have accrued in the interim for work performed up to the close of individual employer's payroll period ending closest to the last day of the preceding calendar month. Each monthly contribution shall be accompanied by a report in a form prescribed by the Board of Trustees. Each contribution to the Fund shall be made promptly, and in any event on or before the 20th day of the calendar month in which it becomes payable, on which date said contribution, if not then paid in full, shall be delinquent.

6.03 The failure of an individual employer to pay the contribution required hereunder at the times and in the manner required by the Trustees shall constitute a violation of such individual employer's obligations hereunder. Nonpayment by an individual employer of any contribution as herein

provided shall not relieve any other individual employer of his obligation to make payment of his required contribution. The Trustees, or its assignee, may take any action necessary to enforce payment of the contributions due hereunder, including the right to sue such individual employer in a State Court of competent jurisdiction; and the delinquent individual employer shall be liable for all expenses of collection thereof, including actual attorneys' fees, incurred by the Trustees or the assignee of the Trust. If the Trustees collectively fail to take proper action against a delinquent individual employer to enforce collection of delinquent payments within a reasonable time after delinquency, such action may be authorized by vote of not less than four Union Trustees or not less than four Employer Trustees; and if such action be authorized by such vote, then any Trustee may institute such action for and on behalf of all of the Trustees. Effective upon any such default or delinquency, the employees, individually and collectively, assign to the Board for collection purposes all of their right, title and interest in and to said payments so due and confer upon and grant to the Trustees, or the Trustees' agent or assignee, all rights of action, lien right, preferences, priorities or other security or rights they may have in connection with or relating to such payments, including the right and authority to file claims in bankruptcy, mechanics' liens and any and all other kinds of claims, demands or actions, including statutory penalties, if any, and including the right to compromise claims. All delinquent payments collected by the Trustees shall be credited to the respective vacation accounts of the employees to whom the payments pertain and all penalties, liquidated damages and reimbursement for attorneys' fees and costs shall be credited to the administrative account of the Fund. No provision of this section or of any section of this Agreement, shall interfere with or qualify the

right of the Union and their representatives to enforce compliance with the terms and provisions of the Collective Bargaining Agreement or to assist in the processing of claims before the Labor Commissioner or any other claims for the payment of sums due the Vacation Plan.

6.04 The parties recognize and acknowledge that the regular and prompt filing of individual employer reports and the regular and prompt payment of individual employer contributions to the Fund is essential to the maintenance in effect of the Plan and the economic administration thereof, and that it would be extremely difficult, if not impracticable, to fix the actual expense and damage to the Fund and to the Plan which would result from the failure of an individual employer to make such reports and to pay such monthly contributions in full within the time provided above. Therefore, the amount of damage to the Fund and Plan resulting from failure to make reports or pay contributions within the time specified, shall be presumed to be the sum of $10.00 or 10% (ten per cent) of the amount of the contribution or contributions due, whichever is greater, for each delinquent report or contribution. These amounts shall become due and payable to the Fund as liquidated damages and not as a penalty, upon the day immediately following the date on which the report or the contribution or contributions become delinquent. Liquidated damages shall be paid for each delinquent report or contribution, even though a delinquent report shall show no contribution due; and shall be paid in addition to any contributions due. However, the Trustees, in their discretion, for good cause (and the Trustees shall have the sole right to determine what shall constitute good cause) shall have the right and power to waive all or any part of any sums due to the Fund as liquidated damages.

6.05 Nothing contained herein shall be deemed to authorize or prevent economic action by any Local Union

against any individual employer who is delinquent in his contributions to the Fund. All rights of any Local Union to refuse to furnish men to any delinquent individual employer, or to withdraw employees from the job of any such employer, or to strike or take other economic action against him, shall be determined by the provisions of the Collective Bargaining Agreement and by applicable rules of law, and shall not be deemed affected in any way by this Agreement.

6.06 Should any employer become delinquent in the payment of wages or contributions hereunder, so that it appears that the employer is or may be in danger of becoming insolvent, the Trustees, or any committee of the Trustees so delegated, may, after notice of its intent so to do being first given in writing to the employer, conduct a hearing to determine if good cause exists to require the employer to secure his obligations to any Trust to whom contributions are required to be paid by the Collective Bargaining Agreement, and to the employees for wages. The employer, the Union, the Association, and any interested person may attend such hearing and offer evidence. If the committee hearing such evidence determines that good cause exists to require the employer to secure his obligations to such Trusts and the employees for wages, it may require him to deposit with the Trust Fund a surety bond, in a form to be uniformly required, in a sum not to exceed $3,000.00. Such bond shall be for such term as the committee shall deem necessary, but not to exceed the term of the Collective Bargaining Agreement. Failure to comply with a determination made hereunder shall be deemed a violation within the meaning of Section 6.03 hereof. The liability of the employer and the surety on his bond with respect to sums required by the Collective Bargaining Agreement to be paid to any of the obligees under such bond shall be deemed conclusively determined if, after a hearing at which the employer shall be

entitled to appear and present evidence, the Trustees shall determine and fix the amount of the payments which said employer shall have failed to make to said obligees or any or all of them. Written notice of such determination shall be given by the obligees, or any or all of them, to the employer and his surety within thirty (30) days after the determination of the amount due, whereupon surety shall immediately become liable therefor, together with interest on that amount from the date of said notice, together with reasonable attorneys' fees and costs, in the event of suit to enforce any obligation hereunder. In the event the amounts found due to the obligees shall exceed the penal sum of the bond, the penal sum of the bond shall be applied to the claims of the respective obligees in the following order of priority:

(a) First: For vacation contributions to this Trust Fund;

(b) Second: For health and welfare contributions to the Laborers Health and Welfare Trust Fund for Southern California;

(c) Third: For pension contributions to the Construction Laborers Pension Trust for Southern California;

(d) Fourth: Liquidated damages, attorneys' fees, and expenses of collection due the respective obligees in the order of priority specified in subparagraphs (a) through (c) above.

In the event any of the laborer employees of employer shall have a claim for unpaid wages, he shall be entitled to recover directly on this bond up to the penal sum thereof but not until such time as the Trustees of the respective obligees

shall have determined and have notified employer and his surety in writing that they have no claim against the employer at that time for unpaid contributions.

ARTICLE VII—GENERAL PROVISIONS

7.01 No party who has verified that he or it is dealing with the duly appointed Trustees, or any of them, shall be obligated to see to the application of any monies or property of the Fund, or to see that the terms of this Trust Agreement have been complied with, or to inquire as to the necessity or expedience of any act of the Trustees. Every instrument executed by the Board of Trustees or by its direction shall be conclusive in favor of every person who relies on it, that (A) at the time of the delivery of the instrument this Trust Agreement was in full force and effect; (B) the instrument was executed in accordance with the terms and conditions of this Trust Agreement; and (C) the Board was duly authorized to execute the instrument or direct its execution.

7.02 The duties, responsibilities, liabilities and disabilities of any Trustee under this Trust Agreement shall be determined solely by the express provisions of this Trust Agreement and no further duties, responsibilities, liabilities or disabilities shall be implied or imposed.

7.03 Neither the Associations, any individual employer, the Union, any Local Union, nor any of the Trustees shall be responsible or liable for:

(a) The validity of this Trust Agreement or the Plan.

(b) The form, validity, sufficiency, or effect of any contract which may be entered into.

(c) Any delay occasioned by any restriction or provision in this Trust Agreement, the Plan, the rules and procedures of the Board of Trustees issued hereunder, any contract or policy procured in the course of the administration of the Fund or Plan, or by any other proper procedure in such

administration of the Fund or Plan, or by any other proper procedure in such administration; provided, however, that this clause shall not excuse any violation of any of the Collective Bargaining Agreements.

(d) The making or retention of any deposit or investment of the Fund, or any portion thereof, or the disposition of any such investment, or the failure to make any deposit or investment of the Fund, or any portion thereof, or any loss or diminution of the Fund, except as to the particular person involved, such loss as may be due to the gross neglect or wilful misconduct of such person.

7.04 Neither the Associations, any individual employer, the Union, nor any Local Union shall be liable in any respect for any of the obligations, acts or omissions of the Trustees or any of them because such Trustees are in any way associated with any such Associations, individual employer, Union, or Local Unions.

7.05 No decision shall be made by the Board of Trustees in the administration of the Fund or Plan which is unreasonably discriminatory under the provisions of the Internal Revenue Code, or under any other applicable law or regulation.

7.06 The name of the Fund may be used to designate the Trustees collectively and all instruments may be effected by the Board of Trustees in such name.

7.07 Subject to the provisions of the Collective Bargaining Agreements, the rights and duties of all parties, including the Associations, the individual employers, the Union, the Local Unions, the employees and their beneficiaries, and the Trustees, shall be governed by the provisions of this Trust Agreement and the Plan and any insurance policies or contracts procured or executed pursuant to this Trust Agreement.

7.08 No employee, or other beneficiary, shall have any right or claim to benefits under the Plan, other than as specified in such Plan. Any dispute as to eligibility, type, amount or duration of benefit shall be resolved by the Board of Trustees under and pursuant to the Plan, and its decision of the dispute shall be final and binding upon all parties thereto. No action may be brought for benefits under the Plan or to enforce any right thereunder until after the claim therefor has been submitted to, and determined by the Board, and thereafter the only action that may be brought is one to enforce the decision of the Board. Neither the Associations, any individual employer, the Union, any Local Union, nor any of the Trustees shall be liable for the failure or omission for any reason to pay any benefits under the Plan.

7.09 Any notice required to be given under the terms of this Trust Agreement or the Plan shall be deemed to have been duly served if delivered personally to the person to be notified in writing, or if mailed in a sealed envelope, postage prepaid, to such person at his last known address as shown in the records of the Fund, or if sent by wire to such person at said last known address.

7.10 This Trust Agreement shall be binding upon and inure to the benefit of all individual employers who are now or hereafter may become members of the Associations or who become in any other way a party to any of the Collective Bargaining Agreements and this Trust Agreement, subject to the approval of the Board of Trustees as herein provided, and the heirs, executors, administrators, successors, purchasers and assigns of the Associations, any individual employer, the Union, any Local Union, and the Trustees, subject to the approval of the Board of Trustees as herein provided.

7.11 This Trust Agreement may be executed in a number of counterparts, each of which shall have the force and effect of any original, and no more than one counterpart need be signed by any party hereto; provided, however, that each of said counterparts shall be filed in the principal office of the Fund.

7.12 All questions pertaining to this Trust Agreement, the Fund or the Plan, and their validity, administration and construction, shall be determined in accordance with the laws of the State of California and with any pertinent laws of the United States.

7.13 If any provision of this Trust Agreement, the Plan, the rules and procedures issued pursuant thereto, or any step in the administration of the Fund or the Plan is held to be illegal or invalid for any reason, such illegality or invalidity shall not affect the remaining portions of this Trust Agreement, the Plan and the rules and procedures, unless such illegality or invalidity prevents accomplishment of the objectives and purposes of this Trust Agreement and the Plan. In the event of any such holding, the parties will immediately commence negotiations to attempt to remedy any such defect.

7.14 All books, records, papers, reports, documents or other information obtained with respect to the Fund or the Plan shall be confidential, and shall not be made public or used for any other purposes, except to the extent necessary for the proper administration of the Fund or the Plan and for the cooperation with other funds or plans authorized by other provisions of this agreement. Nothing in this section shall prohibit the preparation or publication of statistical data and summary reports with respect to the operations of the Fund and the Plan.

7.15 In the establishment and maintenance of the Plan, and in the execution, amendment and implementation of this Trust Agreement, the Union acts for and on behalf of the employees and as their collective bargaining representatives and agents, and every agreement or act of the Union in connection with the establishment, maintenance and operation of the Fund or the Plan shall be deemed to be and is the agreement or act of the employee, or employees, concerned or affected by such agreement or action.

7.16 In the establishment and maintenance of the Plan, and in the execution, amendment and implementation of this Trust Agreement, the Associations act for and on behalf of the individual employers who, at the time of the execution of this Trust Agreement are, or during the term thereof become eligible members of any of the Associations. Also, for and on behalf of any other individual employer who is required by any of the Collective Bargaining Agreements to make contributions to the Fund or who in fact makes one or more contributions to the Fund; provided such contribution or obligation to make such was favorably approved by the Board of Trustees. Every agreement or act of the Associations in connection with the establishment, maintenance and operation of the Fund or the Plan shall be deemed to be and is the agreement or act of the individual employers, or individual employer, concerned or affected by such agreement or action.

7.17 It is the intent and purpose of the parties that contributions to the Fund shall be at all times deductible by the individual employers for income tax purposes in the taxable year when paid, and that the Trust created hereby shall be at all times tax exempt. Application for the qualification of the Trust created by this Trust Agreement under the Internal Revenue Code shall be made as soon as practicable, and the parties and the Board of Trustees shall do whatever may

be necessary to secure such qualification as soon as possible. If any administrative or judicial ruling holds that any provision of this Trust Agreement or of the Plan prevents or defeats the qualification of the Trust as herein provided or any other objective stated in this Section, either under presently existing laws or regulations or under any laws or regulations hereafter enacted or adopted, or if for any reason it shall be necessary or desirable to amend this Trust Agreement or the Plan to accomplish any such objective, the parties will forthwith enter into negotiations with regard to the amendment of this Trust Agreement or the Plan in such respects as may be necessary to accomplish such qualification or other objective, consistent with the other objectives and purposes of this agreement, and any such amendment shall be effective, insofar as practicable, as of the effective date of this Trust Agreement or of the Plan or as of the effective date of any such law or regulation hereafter enacted or adopted, as the case may require.

7.18 In any action or proceeding affecting the Fund, the Plan or the Trust hereby established, it shall be necessary to join as the parties only the Trustees, and no Association, individual employer, the Union, Local Union, employee, beneficiary or any other person shall be entitled to notice of any such proceeding or to service of process therein. Any final judgment entered in any such action or proceeding shall be binding upon all of the above mentioned parties so long as such judgment does not attempt or purport to impose any personal liability upon or against any party not joined or not served in any such action or proceeding.

7.19 A Trustee of this Trust may also be a beneficiary thereof if he otherwise qualifies as an eligible employee and nothing contained herein shall be construed or interpreted to prevent any Trustee, who is also an eligible employee, from participating in the benefits of the Plan.

7.20 Wherever any words are used in this Agreement and Declaration of Trust in the masculine gender they shall be construed as though they were also used in the feminine or neuter gender in all situations where they would so apply, and vice versa; and wherever any words are used in this Agreement and Declaration of Trust in the singular form, they shall be construed as though they were also used in the plural form in all situations where they would so apply, and vice versa.

ARTICLE VIII—ADMISSION OF ADDITIONAL EMPLOYERS OR EMPLOYEES

8.01 Any individual employer (or group of individual employers) who is not a member of or represented by the Associations but who is performing work coming within the jurisdiction of the Union, may become a party to this Trust Agreement, upon approval by the Board of Trustees, by executing in writing and depositing with the Board of Trustees his or its acceptance of any of the Collective Bargaining Agreements and of this Trust Agreement, in a form acceptable to the Board. The Board may provide that this requirement may be satisfied by depositing such an acceptance with the Board of Trustees of the Laborers Health and Welfare Trust for Southern California.

8.02 Any individual employer who executes and deposits any such written acceptance, or who in fact makes one or more contributions to the Fund with the approval of the Board of Trustees assumes and shall be bound by all of the obligations imposed by this Trust Agreement upon the individual employer, is entitled to all rights under this Trust Agreement and is otherwise subject to it in all respects.

8.03 The original signatory Associations and the Union and Local Unions shall at all times have the right and power to select and remove the Trustees and their successors under

this agreement in accordance with the terms of ARTICLE V. Any individual employer and Local Union entering this Plan after the initial effective date agrees to be bound by this provision.

ARTICLE IX—THE PLAN

9.01 On and after July 1, 1966, employees entitled to vacation benefits shall have the right to be paid the sums credited to their respective vacation amounts, subject to the terms and conditions as may be provided by regulation or resolution of the Board of Trustees pursuant to the authority given by this Agreement.

9.02 On or about July 1, 1966, an employee entitled to benefits under this Trust Agreement shall have the right to receive the monies credited to his vacation account by reason of work performed by him in the period June 1, 1965 through March 31, 1966. Thereafter, the monies credited to the vacation account of each employee for work performed by him during the period from April 1 of each year to the last day of March of the succeeding year, or received by the Trust during that period (hereinafter called "normal distribution"), shall be distributed commencing with July 1 of such succeeding calendar year; provided, however, that any such normal distribution so paid shall not include monies received by the Trust later than May 20 of the year in which the vacation benefit is to be paid. A second distribution (hereinafter called "supplemental distribution") shall be made each year commencing on December 1, for the benefit of employees who have duly complied with the application for vacation benefit requirements, as hereinafter more particularly set forth in Section 9.04, with respect to monies received after May 20 and before September 30, which were, therefore, not included in the previous normal distribution.

9.03 Except as provided in Section 9.05, the amount credited to an employee's vacation account shall not be accumulative from one annual period to another, and if any employee fails to cash his check for such amount prior to the 1st day of April following its date of issuance, in the case of the checks issued on or about July 1, or the 1st day of June following its date of issuance, in the case of checks issued on or about December 1, he shall be deemed to have elected to contribute such amount to the cost of maintaining the Fund and Plan in effect and the check issued to him for such period shall thereupon be void and ineffective. All such amounts so contributed shall be transferred promptly to the administrative account of the Fund, and such employee shall be deemed to have released to the Trustees all right, title and interest in and to such amount.

°9.04 Not earlier than January 1 nor later than March 31 of any year, an employee shall make application to the Trust for his normal distribution of vacation benefits, such application to be made in such manner and on such form as the Trustees shall from time to time prescribe. If any employee fails to make such application for a particular normal distribution of vacation benefits prior to the 31st day of March of the year following such normal distribution he shall be deemed to have elected to contribute such amount as well as any related supplemental distribution amounts to the cost of maintaining the Fund and Plan in effect and the amount then credited to his account shall be transferred promptly to the administrative account of the Fund, and such employee shall be deemed to have released to the Trustees all right, title and interest in and to such amount. Subsequent to July 1, but not later than September 30 of each year, an Employee may make application to the Board

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°Amended January 3, 1967.

of Trustees for distribution of his vacation benefits, if any, credited to his account for work in the 12 calendar months ending March 31 of that same year, such application to be made in the manner and on such form as the Board of Trustees shall from time to time prescribe. In the event the Employee has not made a prior application for Normal Distribution in that year, he shall be entitled to receive both the Normal Distribution and the Supplemental Distribution. An Employee who has received his Normal Distribution may nevertheless make application for and receive a Supplemental Distribution relative to the same work year.

9.05 Notwithstanding the provisions of Section 9.03 and 9.04 above, establishing periods of limitation for the application for annual benefits or the cashing of checks, for the year ending March 31, 1966, and the year ending March 31, 1967, the time for making application for benefits shall be extended to and include March 31, 1968 and the time for cashing checks shall be extended to September 30, 1968.

9.06 The Board of Trustees shall establish and maintain records of the contributions received with respect to the work performed by each employee and shall credit such contributions to a vacation account for each such employee. The account of each employee shall be reflected in the records of the Fund, but, notwithstanding such records, the Board of Trustees shall have the right and authority to commingle such contributions with any or all other contributions received with respect to the work performed by other employees and any or all other payments or contributions to the Fund, to deposit all or any part of such commingled monies in one or more bank accounts or accounts in savings and loan associations, to invest and reinvest all or any portion of such monies as provided in Section 5.21(f) of ARTICLE V of this Trust Agreement, and to pay and distribute or cause the payment and distribution of such monies in

accordance with the provisions of this Trust Agreement. The Board may not charge against or deduct from the vacation account of any employee any administrative charge for use in defraying the cost of administering the Fund and Vacation Fund. Such portion of the monies as represents benefits deemed contributed to the Board by an employee pursuant to this Article, liquidated damages, recovery of expenses of collection and any interest or other return shall be used by the Board to defray such administrative cost and to provide for a reserve for the payment of such cost, and if not so used, shall be distributed equitably to the employees and their beneficiaries at such times, upon such terms and in such proportions, without regard to any specific vacation account or accounts, as Board of Trustees may determine.

9.07 Contributions to the Fund and any liquidated damages payable in connection therewith, shall be deemed to be, and shall be, a part of the wages due to the employees with respect to whose work such payments are made. No individual employer shall have any right, title or interest in such contributions, or any part thereof, and no part thereof shall ever revert to any such individual employer. Insofar as consistent with the other provisions of this Agreement, contributions shall be treated and reported as a part of the compensation earned by the employee at the time the work to which the contributions pertain is performed, subject to the terms of this Agreement, and shall be deemed to be, and shall be treated as, subject to withholding tax and social security and unemployment taxes as a part of the total compensation payable at the end of the individual employer's payroll period during which such work is performed or paid for, but the full per hour contribution shall be transmitted to the Fund. Such contributions shall not be a part of the hourly wage rates for the purpose of computing overtime, or reporting time or for any other purpose of the Collective

Bargaining Agreement, or part of the "regular rate" or "basic hourly rate" for the purpose of the Federal Fair Labor Standards Act or the Walsh-Healy Act or any other law, ordinance or regulation, except that if, consistent with the foregoing, such contributions can be considered and treated as a part of the wages prevailing in the area for the purpose of the Federal Davis-Bacon Act and similar federal, state or local laws, ordinances or regulations, they shall be so considered and treated. If any administrative or judicial ruling holds that any provision of this Agreement prevents or defeats any of the objectives stated in this section, the parties will forthwith enter into negotiations with regard to the amendment of this Agreement in such respects as may be necessary to accomplish the objectives so stated, consistent with the other objectives and purposes of this Agreement, and any such amendment shall be effective, insofar as practicable, as of the date of this Agreement.

9.08 It is the intent and purpose of the Plan, and of this Agreement, and a material part of the consideration for the making of contributions to the Fund by individual employers, that the money in each vacation account shall be received by the employee entitled thereto personally. Accordingly, no payments due the Fund and no monies in vacation accounts established pursuant to the Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge by any employee or any other persons and any such anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge shall be void and ineffective. The money credited to a vacation account shall be subject to withdrawal and distribution only at the times, in the manner and for the purposes specified in this Agreement.

9.09 Each employee entitled to benefits under the Plan may file with the Board of Trustees a designation of the

person to whom such benefits shall be paid in the event of the employee's death. The employee may change a beneficiary at any time by signing and filing a new designation. If an employee dies, the amount credited to his vacation account shall be paid to the beneficiary so named by the employee, or if no beneficiary is named, or the beneficiary so named is dead, to the person or persons entitled thereto by law. Payment to such person or persons shall be a complete discharge for liability to the extent of such payment and the Board shall not be obligated to see to the application of money so paid. The person or persons claiming any such payment shall file with the Board a signed application for the payment and proof of the death of the employee and of the right of the applicant or applicants to receive such payment, all in such form as the Board shall prescribe, at any time after death of the employee but not later than the end of the month of April immediately succeeding the calendar year in which the employee dies, and if such applicant and proof is not filed within such time the person or persons entitled to the payment shall be deemed to have elected to contribute such amount to the cost of maintaining the Vacation Plan in effect and to have released to the Board and the Plan all right, title and interest in and to such payment.

9.10 (Deleted January 3, 1967).

9.11 The Trustees in their absolute discretion and upon good and sufficient reasons shown, may relieve any employee from any default with respect to the provisions of this Article on any terms and conditions they may deem desirable or appropriate.

9.12 Upon each date upon which distribution is to be made hereunder, separate checks shall be issued to each employee for each calendar year for which vacation benefits are being distributed, such calendar year to be identified upon each such check.

9.13 This ARTICLE IX may be amended or modified by action of the Trustee subject to the terms and conditions of the Collective Bargaining Agreement and to Section 10.07 of ARTICLE X of this Trust Agreement. In such case, the provisions of ARTICLE X, Section 10.01 through 10.04 of this Agreement shall not apply to such amendment.

ARTICLE X—AMENDMENT, DURATION AND TERMINATION

10.01 This Agreement and Declaration of Trust and the Plan which is attached hereto as a part hereof may be amended, from time to time, in any respect not specifically prohibited herein. The right and power to amend this Agreement and Declaration of Trust and Vacation Plan is hereby granted to and vested exclusively in the Trustees. The method and procedure for amending this Agreement shall be as follows:

(a) The proposed amendment must first be presented and discussed at a meeting of the Board of Trustees. The amendment shall not be voted upon at the first meeting at which it is considered.

(b) The form of the proposed amendment must be set forth in writing and mailed to each Trustee not less than ten (10) days prior to the meeting at which it is to be voted upon, together with a notice stating the time and place of the meeting of the Trustees at which such amendment is to be voted upon.

(c) At the meeting set forth in the notice mentioned above, the Trustees shall vote upon the proposed amendment.

Amendments may also be made by unanimous written consent of the Trustees as provided in Section 5.16 above.

Any amendments shall be binding upon all parties to this Agreement. Such amendments shall be evidenced by written

instruments authenticated by the Chairman and Secretary. Such written instruments shall be attached to this Agreement.

10.02 No amendment may be adopted which will alter the basic principles of this Agreement and Declaration of Trust or be in conflict with the then existing bargaining agreements with the Union or be contrary to any then applicable law or governmental rule or regulation.

10.03 No Amendment shall be permitted which permits the Fund to be used other than to provide for vacation benefits for the employees and for the administration of the Fund. Nor shall any amendment be permitted which gives to the Association, individual employer, Union, or Local Union, individually or collectively, any individual right, title or interest in the money or property of the Fund, except as to the benefits to be paid in accordance with this Agreement.

10.04 Whenever an amendment is adopted in accordance with this Article, a copy thereof shall be distributed to each Trustee, the Association and the Union.

10.05 Subject to the provisions of this Article and Section 7.13 hereof, this Trust is irrevocable and the provisions of this Trust Agreement shall continue in effect during the term of the Collective Bargaining Agreements, and any amendments, modifications, renewals, or extensions thereof with respect to such Collective Bargaining Agreements as provide for the continuation of payments into the Fund.

10.06 This Trust Agreement and the Trust herein provided may be terminated by the Associations and the Union by an instrument in writing executed by mutual consent at any time, subject to the provisions of Section 10.07 of this Article. Upon the termination of such Trust, any monies remaining in the Fund after the payment of all expenses and

obligations of the Trust shall be exhausted by application of the Trust Estate to the following purposes so long as the assets of the Trust Fund will permit after the payment of all expenses of operating and/or winding up the Fund:

(a) To pay or provide for the payment of all reasonable and necessary expenses in connection with collecting the employer contributions and administering the affairs of the Trust and Fund, including but without limitation, all expenses which may be incurred in connection with the establishment of the Trust and Fund, and the providing of fidelity bonds, the employment of administrative, legal, expert and clerical assistance, the purchasing or leasing of such materials, supplies and equipment as the Trustees in their discretion find necessary and appropriate in the performance of their duties.

(b) To pay or provide for the payment of additional vacation benefits to employees, eligible at the time of the termination of the Trust in such amounts and forms as to the Trustees shall appear to be most equitable.

The administration of such benefits shall be under the supervision of the Trustees acting as of such date and shall be in accordance with the terms and provisions of this Agreement and the Plan.

10.07 In no event shall any amendment or modification of this Trust Agreement, or the termination of this Trust Agreement, cause or result in any portion of the Fund reverting to, or being recoverable by, any Association, any individual employer, the Union, or any Local Union, or cause or result in the diversion of any portion of the Fund to any purpose other than the exclusive benefit of employees or their beneficiaries under the Plan and the payment of the administrative expenses of the Fund and the Plan, or the refund of erroneous payments.

10.08 In no event shall the Trust established by this Trust Agreement continue for a longer period than is permitted by law.

Executed at Los Angeles County, California, as of the 14th day of April, 1966.

EACH OF THOSE SIGNING AS "ASSOCIATIONS" BELOW EXPRESSLY WARRANTS THAT HE IS AUTHORIZED TO EXECUTE THIS AGREEMENT ON BEHALF OF THE ASSOCIATION LISTED OVER HIS SIGNATURE AND WARRANTS THAT ALL OF THE ELIGIBLE MEMBERS OF SAID "ASSOCIATION" ARE PARTIES TO AND BOUND BY THE TERMS AND PROVISIONS OF THIS AGREEMENT FOR ITS DURATION; AND FURTHER WARRANTS THAT ANY INDIVIDUAL EMPLOYER WHO SHALL BECOME AN ELIGIBLE MEMBER OF SAID "ASSOCIATION" ON OR AFTER THIS DATE AND DURING THE TERM OF THIS AGREEMENT SHALL AUTOMATICALLY BECOME SUBJECT TO AND BOUND BY THIS AGREEMENT DURING ITS TERM.

Associations

SOUTHERN CALIFORNIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

/s/ By W. D. Shaw

BUILDING CONTRACTORS' ASSOCIATION OF CALIFORNIA, INC.

/s/ By Edward M. Sills

ENGINEERING AND GRADING CONTRACTORS' ASSOCIATION, INC.

/s/ By W. C. Burke

HOME BUILDERS ASSOCIATION OF LOS ANGELES, ORANGE AND VENTURA COUNTIES,
(successor to HOME BUILDERS INSTITUTE, INC.)
/s/ By R. A. Alsweet

Union

SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS, INDIVIDUALLY AND FOR AND ON BEHALF OF ITS AFFILIATED LOCAL UNIONS IN SOUTHERN CALIFORNIA, WHICH HAVE JURISDICTION OVER THE WORK AS SET FORTH IN THAT CERTAIN DOCUMENT KNOWN AS "MASTER LABOR AGREEMENT BETWEEN SOUTHERN CALIFORNIA GENERAL CONTRACTORS AND SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS," DATED JUNE 1, 1965.
/s/ By James V. Flores
/s/ By Ray Waters
/s/ By James V. Brimhall

The undersigned, named as Original Trustees in the foregoing Agreement and Declaration of Trust, do acknowledge they have read the foregoing instrument, do understand the contents thereof, and do hereby agree to act as Trustees thereunder, to comply with all of its terms and provisions,

and to hold the Fund created by said Agreement in trust for the uses and purposes set forth in the Agreement.

/s/ James V. Flores
/s/ James H. Crowell
/s/ Ray Waters
/s/ Ray Mendoza
/s/ Joseph Y. Murdock
/s/ Ray M. Wilson
/s/ Don E. Graves
/s/ Nick Orsua
/s/ S. J. Hibbler
/s/ Herb W. Smith
/s/ R. C. Gallyon
/s/ Peter E. Johnson
/s/ Reed Sprinkel
/s/ E. M. Barker
/s/ R. A. Alsweet
/s/ Syd Carnine
DATED: April 14, 1966.

EXHIBIT "B".

State of California Franchise Tax Board.

CERTIFICATE OF TAX DUE AND DELINQUENCY

Filed Pursuant to Part 10 or 11, Division 2, Revenue and Taxation Code.

State of California, County of Sacramento—ss.

The Franchise Tax Board does hereby certify:

That the taxpayer named below has become and is delinquent in payment of tax, penalties, and interest imposed upon said taxpayer under the provisions of the California Revenue and Taxation Code.

That the name of said taxpayer, the last known address, and the amount of tax, penalties, and interest with reference to which said taxpayer is now delinquent are as follows:

Jesse Murphy
10003 South Spring Street
Los Angeles, CA 90003

Year Ended	Tax	Penalties	Interest	Costs	Payments	Total
12/76	$37.00	$ 00	$11.70	$0.00	$0.00	$48.70
TOTALS	$37.00	$0.00	$11.70	$0.00	$0.00	$48.70

Additional interest on the total unpaid tax and interest bearing penalties accrues from May 31, 1980, at $0.012 per day.

That the following Certificate(s) of Amount of Tax, Penalties, and Interest Due have been filed as follows: None

That the said taxpayer is indebted to the State of California in the above amount; that no part of said indebtedness has been paid and that the whole thereof is now due, owing and unpaid from said taxpayer to the State of California; that the Franchise Tax Board has fully complied with all provisions of the Revenue and Taxation Code relating to the computation and levy of said tax, penalties, and interest.

IN WITNESS WHEREOF, the Franchise Tax Board has caused this Certificate to be executed in its name and on its behalf and its seal to be affixed by the under-signed, thereunto duly authorized.

Dated June 9, 1980

(Seal)

FRANCHISE TAX BOARD
of the State of California
Telephone (916) 355-0945

By /s/ John D. Dykeman
Authorized Representative

EXHIBIT "C".

[Letterhead]

State Of California
FRANCISE TAX BOARD
Sacramento, CA 95867

RE: Name: Jesse MURPHY
Social Security No.: 545 38 5120

Gentlemen:

Receipt is acknowledged of a lien from your office against vacation benefits due the above-named.

On January 11, 1977, co-counsel for this Trust requested an opinion letter from the Administrator, Pension and Welfare Benefit Programs, United States Department of Labor, as to whether we are permitted to honor such lien under the provisions of the Employee Retirement Income Security Act of 1974.

Pending a reply, we are holding your lien and we are also holding payment of vacation benefits to the beneficiary named above.

Sincerely,

/s/ Gladys Gomez
Gladys Gomez
VACATION DEPARTMENT

Received in March 14, 1979, Special Procedures.

EXHIBIT "D".

State of California Franchise Tax Board.

CERTIFICATE OF TAX DUE AND DELINQUENCY

Filed Pursuant to Part 10 or 11, Division 2, Revenue and Taxation Code.

State of California, County of Sacramento—ss.

The Franchise Tax Board does hereby certify:

That the taxpayer named below has become and is delinquent in payment of tax, penalties, and interest imposed upon said taxpayer under the provisions of the California Revenue and Taxation Code.

That the name of said taxpayer, the last known address, and the amount of tax, penalties, and interest with reference to which said taxpayer is now delinquent are as follows:

Eriberto G. Salcedo
11852 Lakeland Road
Norwalk, CA 90650

Year Ended	Tax	Penalties	Interest	Costs	Payments	Total
12/75	$232.00	$58.00	$67.38	$0.00	$189.00	$168.38
12/76	30.00	0.00	8.57	0.00	0.00	38.57
TOTALS	$262.00	$58.00	$75.95	$0.00	$189.00	$206.95

Additional interest on the total unpaid tax and interest bearing penalties accrues from May 31, 1980, at $0.043 per day.

That the following Certificate(s) of Amount of Tax, Penalties, and Interest Due have been filed as follows: None

That the said taxpayer is indebted to the State of California in the above amount; that no part of said indebtedness has been paid and that the whole thereof is now due, owing and unpaid from said taxpayer to the State of California; that the Franchise Tax Board has fully complied with all pro-

visions of the Revenue and Taxation Code relating to the computation and levy of said tax, penalties, and interest.

IN WITNESS WHEREOF, the Franchise Tax Board has caused this Certificate to be executed in its name and on its behalf and its seal to be affixed by the under-signed, thereunto duly authorized.

Dated June 9, 1980

(Seal)

FRANCHISE TAX BOARD
of the State of California
Telephone (916) 355-0945

By /s/ John D. Dykeman
Authorized Representative

EXHIBIT "E".

[Letterhead]

State of California
Franchise Tax Board
Sacramento, CA 95867

Jan. 18, 1978

Re: Name: Eriberto G. Salcedo
Social Security No. 559 62 1369
Your Br. No.: 97

Gentlemen:

Receipt is acknowledged of a lien from your office against vacation benefits due the above-named.

On January 11, 1977, co-counsel for this Trust requested an opinion letter from the Administrator, Pension and Welfare Benefit Programs, United States Department of Labor, as to whether we are permitted to honor such lien under the provisions of the Employee Retirement Income Security Act of 1974.

Pending a reply, we are holding your lien and we are also holding payment of vacation benefits to the beneficiary named above.

Sincerely,

/s/ N. Malitz
N. Malitz
VACATION DEPARTMENT

EXHIBIT "F".

State of California Franchise Tax Board.

CERTIFICATE OF TAX DUE AND DELINQUENCY

Filed Pursuant to Part 10 or 11, Division 2, Revenue and Taxation Code.

State of California, County of Sacramento—ss.

The Franchise Tax Board does hereby certify:

That the taxpayer named below has become and is delinquent in payment of tax, penalties, and interest imposed upon said taxpayer under the provisions of the California Revenue and Taxation Code.

That the name of said taxpayer, the last known address, and the amount of tax, penalties, and interest with reference to which said taxpayer is now delinquent are as follows:

Vincente Zarate
19223 Saticoy #34
Reseda, CA 91335

Year Ended	Tax	Penalties	Interest	Costs	Payments	Total
12/77	$586.00	$28.32	$24.59	$0.00	$514.00	$124.91
TOTALS	$586.00	$28.32	$24.59	$0.00	$514.00	$124.91

Additional penalty on the total unpaid tax accrues from May 31, 1980, at $0.012 per day until April 15, 1981.

Additional interest on the total unpaid tax and interest bearing penalties accrues from May 31, 1980, at $0.028 per day.

That the following Certificate(s) of Amount of Tax, Penalties, and Interest Due have been filed as follows: None

That the said taxpayer is indebted to the State of California in the above amount; that no part of said indebtedness has been paid and that the whole thereof is now due, owing and unpaid from said taxpayer to the State of California; that the Franchise Tax Board has fully complied with all pro-

visions of the Revenue and Taxation Code relating to the computation and levy of said tax, penalties, and interest.

IN WITNESS WHEREOF, the Franchise Tax Board has caused this Certificate to be executed in its name and on its behalf and its seal to be affixed by the under-signed, thereunto duly authorized.

Dated June 9, 1980

(Seal)

FRANCHISE TAX BOARD
of the State of California
Telephone (916) 355-0945

By /s/ John D. Dykeman
Authorized Representative

EXHIBIT "G".

[Letterhead]

State of California
FRANCHISE TAX BOARD
Sacramento, CA 95867

RE: Name: V. ZARATE
Social Security No.: 569 70 7202

Gentlemen:

Receipt is acknowledged of a lien from your office against vacation benefits due the above-named.

On January 11, 1977, co-counsel for this Trust requested an opinion letter from the Administrator, Pension and Welfare Benefit Programs, United States Department of Labor, as to whether we are permitted to honor such lien under the provisions of the Employee Retirement Income Security Act of 1974.

Pending a reply, we are holding your lien and we are also holding payment of vacation benefits to the beneficiary named above.

Sincerely,

/s/ Gladys Gomez
GLADYS GOMEZ
VACATION DEPARTMENT

Received in March 14, 1979, Special Procedures.

EXHIBIT "H".

[Letterhead]

Received in January 15, 1980, Special Procedures.

January 7, 1980

Mr. John D. Dykeman
Special Procedures Section
Franchise Tax Board
Sacramento, California 95867

Re: Construction Laborers Vacation Trust for Southern California
Your File No. 340:97:JDD:dmf

Dear Mr. Dykeman:

We have now finally received the opinion letter from the United States Department of Labor relative to the liens which you have served upon us for personal income tax, as well as other liens which have been served upon us by the Franchise Tax Board. We are enclosing a copy of that opinion letter.

The conclusion which is set forth in the first full paragraph of the fourth page is that Section 514 of ERISA pre-empts State law and that the Trustees lack the power to honor the levies made upon us by the State of California.

Co-counsel propose to recommend to the Board of Trustees at their next meeting that the monies which have been withheld pending the receipt of this opinion letter be distributed to the Plan participants.

Since the next meeting has not yet been scheduled, we would assume that it would not be set before the middle of

February, 1980, in the event you desire to institute legal action to test this opinion.

Very truly yours,
RICHMAN & GARRETT
/s/ Lionel Richman
Lionel Richman

LR/hal
cc (w/enc.): George M. Cox, Esq.
Mr. Edward Ashton
Mr. Ray M. Wilson
Construction Laborers Vacation Trust
for Southern California

[Letterhead]

U.S. Department of Labor.

Dec. 28, 1979

Mr. Lionel Richman
Richman & Garrett
1336 Wilshire Boulevard
Los Angeles, California 90017

Dear Mr. Richman:

This is in response to your request for an opinion on behalf of the Construction Laborers Vacation Trust for Southern California (Plan) regarding the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the trustees of the Plan may honor (1) the process of any state judicial or administrative agency seeking to levy upon benefits due a beneficiary under the Plan, and (2) process from the U.S. Internal Revenue Service (IRS) directed to monies due a beneficiary under the Plan.

You advise that the Plan is created by a written agreement and declaration of trust pursuant to section 302 of the Labor Management Relations Act, 1947, as amended (LMRA). Under a collective bargaining agreement, employers are obligated to pay to the Plan a fixed sum per hour for each hour worked on behalf of each employee covered by the collective bargaining agreement. The contributions are added to the employee's pay for the purpose of calculating appropriate taxes and then are deducted and transmitted to the Plan. The Plan holds the funds for annual distribution. The State of California, acting through the State Board of Equalization, has served a "Notice to Withhold" for sales and use tax, under state law, upon the Plan, seeking to seize benefits due a particular beneficiary under the Plan. Prior to the effective date of ERISA, the Franchise Tax Board of the State of California made similar levies for state in-

come taxes and other state agencies made similar levies for unpaid unemployment insurance contributions due from beneficiaries who were formerly employers. From time to time, the U.S. Internal Revenue Service (IRS) also has made such levies.

You further advise that section 9.08 of the trust instrument reads as follows:

> "It is the intent and purpose of the Plan, and of this Agreement, and a material part of the consideration for the making of contributions to the Fund by individual employers, that the money in each vacation account shall be received by the employee entitled thereto personally. Accordingly, no payments due the Fund and no monies in vacation accounts established pursuant to the Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge by any employee or other persons and any such anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge shall be void and ineffective. The money credited to a vacation account shall be subject to withdrawal and distribution only at the times, in the manner and for the purposes specified in this Agreement."

We assume that in using the word "beneficiary" in your letter you mean a "participant" or "beneficiary" as these terms are defined by ERISA sections 3(7) and (8).

Section 403(c)(1) of ERISA provides, as here relevant, that "the assets of a plan . . . shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." Similarly, section 404(a)(1) of ERISA provides, in part, that:

> . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan; . . . and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title.

Section 514 of ERISA provides, in part, as follows:

(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect January 1, 1975. . . .

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

(d) Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law.

Section 514(a) established a broad preemption of all state laws insofar as they may relate to any employee benefit plan

covered by title I of ERISA. The reasons for broad preemption of state laws under ERISA were succinctly stated by Senator Javits, a major sponsor and floor manager of the bill, during its final consideration as follows:

> Both the House and Senate bills provided for preemption of State Law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension plans not clearly connected to the Federal regulatory scheme.
>
> Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs. 120 Cong. Rec. S15751 (daily ed. Aug. 22, 1974).

Based on the above, it is the position of the Department of Labor that the process of any state judicial or administrative agency seeking to levy for unpaid taxes or unpaid unemployment insurance contributions upon benefits due a participant or beneficiary under the Plan is pre-empted under ERISA section 514.

With regard to process from the IRS, section 514(d) of ERISA provides that no provision should be construed in such a way as to affect any other Federal law or any rule or regulation issued under that law. Section 6334(c) of the Internal Revenue Code of 1954, which was in effect before

the enactment of ERISA, provides that notwithstanding any other law of the United States, no property or right to property is exempt from a Federal tax levy other than certain property which is specifically made exempt under section 6334(a). The specific exemptions set forth in section 6334(a) do not include the type of benefits with which you are concerned. Therefore, it is the view of the Department that the trustees of the Plan may honor such IRS tax levies and, pursuant to ERISA section 514(d), not be in violation of ERISA sections 403(c)(1) and 404(a)(1).

It should be noted that no opinion is expressed herein as to any application of section 302 of the LMRA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (copy enclosed). Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 relating to the effect of advisory opinions.

Sincerely,

/s/ Ian D. Lanoff
Ian D. Lanoff
Administrator
of Pension and Welfare
Benefit Programs

Enclosure

cc: Mr. George M. Cox
Cox, Castle, Nicholson & Weekes
2049 Century Park East, 28th Floor
Los Angeles, California 90067

FEDERAL SUPPLEMENTAL BENEFITS (EMERGENCY UNEMPLOYMENT COMPENSATION)

Ending of Federal Supplemental Benefit Period in Montana

This notice announces the ending of the Federal Supplemental Benefit Period in the State of Montana effective August 28, 1976.

BACKGROUND

The Emergency Unemployment Compensation Act of 1974 (Pub. L. 93-572, enacted December 31, 1974) (the Act) created a temporary program of supplementary unemployment benefits (referred to as Federal Supplemental Benefits) for unemployed individuals who have exhausted their rights to regular and extended benefits under State and Federal unemployment compensation laws. Federal Supplemental Benefits are payable during a Federal Supplemental Benefit Period in a State which has entered into an Agreement under the Act with the United States Secretary of Labor. A Federal Supplemental Benefit Period is triggered on in a State when unemployment in the State or in the State and the nation reaches the high levels set in the Act. During a Federal Supplemental Benefit Period the maximum amount of Federal Supplemental Benefits which are payable to eligible individuals is up to 13 weeks or 26 weeks, depending upon the level of the rate of insured unemployment in the State. A Federal Supplemental Benefit Period commenced in the State of Montana on January 26, 1975.

The Act also provides that a Federal Supplemental Benefit Period in a State will trigger off when the rate of insured unemployment in the State averages less than 5.0 percent over a period of thirteen consecutive calendar weeks. The benefit period actually terminates at the end of the third

week after the week for which there is an "off" indicator, if the benefit period will have been in effect for a minimum duration of 26 weeks.

DETERMINATION OF "OFF" INDICATOR

The employment security agency of the State of Montana has determined under the Act and 20 CFR 618.19(b) (published in the Federal Register on March 23, 1976, at 41 FR 12151, 12157) that the average rate of insured unemployment in the State for the period consisting of the week ending on August 7, 1976, and the immediately preceding twelve weeks, was less than 5.0 percent.

Therefore, I have determined in accordance with the Act and 20 CFR 618.19(b), and as authorized by the Secretary of Labor's Order 4-75, dated April 16, 1975 (published in the Federal Register on April 28, 1975, at 40 FR 18515), that there was a Federal Supplemental Benefit "off" indicator in the State of Montana for the week ending on August 7, 1976, and that the Federal Supplemental Benefit Period in that State terminates on August 28, 1976.

INFORMATION FOR CLAIMANTS

Any individual whom Federal Supplemental Benefits or Federal-State Extended Benefits were payable in the State (whether or not any payment actually was made), for any portion of the last week of the Federal Supplemental Benefit Period, will have an additional eligibility period beinning immediately following the end of the Federal Supplemental Benefit Period. During the additional eligibility period the individual will be entitled to Federal Supplemental Benefits to the same extent as if the Federal Supplemental Benefit Period continued to be in effect. The additional eligibility period will have a duration of 13 weeks, unless it is terminated sooner by reason of the beginning of a new Federal Supplemental Benefit Period in the State.

Individuals currently filing claims for Federal Supplemental Benefits will receive written notices from the Montana Division of Employment Security, Department of Labor, of the end of the Federal Supplemental Benefit Period in that State and its effect on their entitlement to Federal Supplemental Benefits. The notice to any individual who will have an additional eligibility period following the Federal Supplemental Benefit Period will include information concerning potential entitlement to Federal Supplemental Benefits during the additional eligibility period.

Although the Federal Supplemental Benefit Period has terminated, an Extended Benefit Period will continue in effect in the State due to the National "on" indicator for the Federal-State Extended Benefit Program, as announced in a notice published in the Federal Register on February 21, 1975, at 40 FR 4722. Therefore, Federal-State Extended Benefits will continue to be payable to eligible individuals in the State.

Persons who wish information about their rights to Federal Supplemental Benefits or Federal-State Extended Benefits in the State of Montana should contact the nearest Employment Service Office of the Montana Employment Security Division in their locality.

Signed at Washington, D.C., on August 23, 1976.

WILLIAM H. HOLBERG,
Assistant Secretary for
Employment and Training.

[*FR Doc. 76-25242 Filed 8-26-76; 8:45 am*]

Office of Employee Benefits Security

EMPLOYEE BENEFIT PLANS

Advisory Opinion Procedure

It is the practice of the Department of Labor (the Department) to answer inquiries of individuals or organizations affected, directly or indirectly, by the Employee Retirement Income Security Act of 1974 (Pub. L. 93-406, hereinafter "the Act") as to their status under the Act and as to the effect of certain acts and transactions. The answers to such inquiries are categorized as "information letters" and "advisory opinions." This "ERISA Procedure" (ERISA Proc. 76-1) describes the general procedures of the Department in issuing information letters and advisory opinions under the Act, and is designed to promote efficient handling of inquiries and to facilitate prompt responses.

Section 7 of this procedure (instructions to individuals and organizations requesting advisory opinions relating to prohibited transactions and common definitions) is reserved. This section will set forth the procedure to be followed to obtain an advisory opinion relating to prohibited transactions and common definitions, such as whether a person is a party in interest and a disqualified person. In general, this section will incorporate a revenue procedure to be published by the Internal Revenue Service.

This advisory opinion procedure consists of rules of agency procedure and practice, and is therefore excepted under 5 U.S.C. 552(b)(3)(A) of the Administrative Procedure Act from the ordinary notice and comment provisions for agency rulemaking. Accordingly, the procedure is effective August 27, 1976.

Section 1. *Purpose*. The purpose of this ERISA Procedure is to describe the general procedures of the Department of Labor (the Department) in issuing information let-

ters and advisory opinions to individuals and organizations under the Employee Retirement Income Security Act of 1974 (Pub. L. 93-406), hereinafter referred to as "the Act". This ERISA Procedure also informs individuals and organizations, and their authorized representatives, where they may direct requests for information letters and advisory opinions, and outlines procedures to be followed in order to promote efficient handling of their inquiries.

Sec. 2. *General practice*. It is the practice of the Department to answer inquiries of individuals and organizations, whenever appropriate, and in the interest of sound administration of the Act, as to their status under the Act and as to the effects of their acts or transactions. One of the functions of the Department is to issue information letters and advisory opinions in such matters.

Sec. 3. *Definitions*. .01 An "information letter" is a written statement issued either by the Pension and Welfare Benefit Programs (Office of Employee Benefits Security), U.S. Department of Labor, Washington, D.C. or a Regional Office or an Area Office of the Labor-Management Services Administration, U.S. Department of Labor, that does no more than call attention to a well-established interpretation or principle of the Act, without applying it to a specific factual situation. An information letter may be issued to any individual or organization when the nature of the request from the individual or the organization suggests that it is seeking general information, or where the request does not meet all the requirements of section 6 or 7 of this procedure, and it is believed that such general information will assist the individual or organization.

.02 An "advisory opinion" is a written statement issued to an individual or organization, or to the authorized representative of such individual or organization, by the Administrator of Pension and Welfare Benefit Programs or his

delegate, that interprets and applies the Act to a specific factual situation. Advisory opinions are issued only by the Administrator of Pension and Welfare Benefit Programs or his delegate.

.03 Individuals and organizations are those persons described in section 4 of this procedure.

Sec. 4. *Individuals and organizations who may request advisory opinions or information letters*. .01 Any individual or organization affected directly or indirectly, by the Act may request an information letter or an advisory opinion from the Department.

.02 A request by or for an individual or organization must be signed by the individual or organization, or by the authorized representative of such individual or organization. See section 7.03 of this procedure.

Sec. 5. *Discretionary Authority to Render Advisory Opinions*. .01 The Department will issue advisory opinions involving the interpretation of one or more sections of the act, regulations promulgated under the Act, Interpretive bulletins, or exemptions issued by the Department to a specific factual situation. Generally, advisory opinions will be issued by the Department only with respect to prospective transactions (i.e., a transaction which will be entered into). Moreover, there are certain areas where, because of the inherently factual nature of the problem involved, or because the subject of the request for opinion is under investigation for a violation of the Act, the Department ordinarily will not issue advisory opinions. Generally, an advisory opinion will not be issued on alternative courses of proposed transactions, or on hypothetical situations, or where all parties involved are not sufficiently identified and described, or where material facts, or details of the transaction are omitted.

.02 The Department ordinarily will not issue advisory opinions relating to the following sections of the Act:

.02(a) Section 3(18), relating to whether certain consideration constitutes adequate consideration;

.02(b) Section 3(26), relating to whether the valuation of any asset is at present value;

.02(c) Section 3(27), relating to whether the valuation of any asset is at present value;

.02(d) Section 102(a)(1), relating to whether a summary plan description is written in a manner calculated to be understood by the average participant.

.02(e) Section 103(a)(3)(A), relating to whether the financial statements and schedules required to be included in the Annual Report are presented fairly in conformity with generally accepted accounting principles applied on a consistent basis;

.02(f) Section 103(b)(1), relating to whether a matter must be included in a financial statement in order to fully and fairly present the financial statement of the plan;

.02(g) Section 202 (other than section 202(a)(3) and (b) (1)) relating to minimum participation standards;

.02(h) Section 203 (other than sections 202(a)(3)(B), (b)(1) (flush language), (b)(2), (b)(3)(A);

.02(i) Section 204 of the Act (other than sections 204 (b)(1)(B), (b)(1)(A), (C), (D), (E)), relating to benefit accrual requirements;

.02(j) Section 205(e), relating to the period during which a participant may elect in writing not to receive a joint and survivor annuity;

.02(k) Section 208, relating to mergers and consolidation of plans or transfer of plan assets;

.02(l) Section 209(a)(1), relating to whether the report required by section 209(a)(1) is sufficient to inform the employee of his accrued benefits under the plan, etc.

.02(m) Sections 302 through 305, relating to minimum funding standards;

.02(n) Section 403(c)(1), relating to the purposes for which plan assets must be held;

.02(o) Section 404(a), relating to fiduciary duties as applied to particular conduct; and,

.02(p) Section 407(a) (2) and (3) and (c)(1), relating to fair market value, as applied to whether the value of any particular security or real property constitutes fair market value.

This list is not all inclusive and the Department may decline to issue advisory opinions relating to other sections of the Act whenever warranted by the facts and circumstances of a particular case. The Department may, when it is deemed appropriate and in the best interest of sound administration of the Act, issue information letters calling attention to established principles under the Act, even though the request that was submitted was for an advisory opinion.

.03 Pending the adoption of regulations (either temporary or final) involving the interpretation of the application of a provision of the Act, consideration will be given to the issuance of advisory opinions relating to such provisions of the Act only under the following conditions:

.03(a) If an inquiry presents an issue on which the answer seems to be clear from the application of the provisions of the Act to the facts described, the advisory opinion will be issued in accordance with the procedures contained herein.

.03(b) If an inquiry presents an issue on which the answer seems reasonably certain but not entirely free from

doubt, an advisory opinion will be issued only if it is established to the satisfaction of the Department, that a business emergency requires an advisory opinion or that unusual hardship to the plan or its participants and beneficiaries will result from failure to obtain an advisory opinion. In any case in which the individual or organization believes that a business emergency exists or that an unusual hardship to the plan or its participants and beneficiaries will result from the failure to obtain an advisory opinion the individual or organization should submit with the request a separate letter setting forth the facts necessary for the Department to make a determination in this regard. In this connection the Department will not deem a "business emergency" to result from circumstances within the control of the individual or organization such as, for example scheduling within an inordinately short time the closing date of a transaction or a meeting of the Board of Directors of the shareholders of a corporation.

.03(c) If an inquiry presents an issue that cannot be reasonably resolved prior to the issuance of a regulation, an advisory opinion will not be issued.

.04 The Department ordinarily will not issue advisory opinions on the form or effect in operation of a plan, fund, or program (or a particular provision or provisions thereof) subject to Title I of the Act. For example, the Department will not issue an advisory opinion on whether a plan satisfies the requirements of Parts 2 and 3 of Title I of the Act.

Sec. 6. *Instructions to individuals and organizations requesting advisory opinions from the Department.* .01 If an advisory opinion is desired, a request should be submitted to: Advisory Opinion, Office of Regulatory Standards and Exceptions, Pension and Welfare Benefit Programs, U.S. Department of Labor, Washington, D.C. 20216.

.02 A request for an advisory opinion must contain the following information:

.02(a) The name and type of plan or plans (e.g., pension, profit-sharing, or welfare plan); the Employer Identification Number (EIN); the Plan Number (PN) used by the plan in reporting to the Department of Labor on Form EBS-1; or a copy of the first two pages of the most recent Form EBS-1 filed with the Department.

.02(b) A detailed description of the act or acts or transaction or transactions with respect to which an advisory opinion is requested. Where the request pertains to only one step of a larger integrated act or transaction, the facts, circumstances, etc., must be submitted with respect to the entire transaction. In addition, a copy of all documents submitted must be included in the individual's or organization's statement and not merely incorporated by reference, and must be accompanied by an analysis of their bearing on the issue or issues, specifying the pertinent provisions.

.02(c) A discussion of the issue or issues presented by the act or acts or transaction or transactions which should be addressed in the advisory opinion.

.02(d) If the individual or organization is requesting a particular advisory opinion, the requesting party must furnish an explanation of the grounds for the request together with a statement of relevant supporting authority. Even though the individual or organization is urging no particular determination with regard to a proposed or prospective act or acts or transaction or transactions, the party requesting the ruling must state such party's views as to the results of the proposed act or acts or transaction or transactions and furnish a statement of relevant authority to support such views.

.03 A request for an advisory opinion by or for an individual or organization must be signed by the individual or organization or by the individual's or organization's authorized representative. If the request is signed by a representative of an individual or organization, or the representative may appear before the Department in connection with the request, the request must include a statement that the representative is authorized to represent the individual or organization.

.04 A request for an advisory opinion that does not comply with all the provisions of this procedure will be acknowledged, and the requirements that have not been met will be noted. Alternatively, at the discretion of the Department, the Department will issue an information letter to the individual or organization.

.05 If the individual or organization, or the authorized representative, desires a conference in the event the Department contemplates issuing an adverse advisory opinion, such desire should be stated in writing when filing the request or soon thereafter in order that the Department may evaluate whether in the sole discretion of the Department, a conference should be arranged and at what stage of the consideration a conference would be most helpful.

.06 It is the practice of the Department to process requests for information letters and advisory opinions in regular order and as expeditiously as possible. Compliance with a request for consideration of a particular matter ahead of its regular order, or by a specified time, tends to delay the disposition of other matters. Requests for processing ahead of the regular order, made in writing (submitted with the request or subsequent thereto) and showing clear need for such treatment, will be given consideration as the particular circumstances warrant. However, no assurance can be given that any letter will be processed by the time requested. The

Department will not consider a need for expedited handling to arise if the request shows such need has resulted from circumstances within the control of the person making the request.

.07 An individual or organization, or the authorized representative desiring to obtain information relating to the status of his or her request for an advisory opinion may do so by contacting the Office of Regulatory Standards and Exceptions, Pension and Welfare Benefit Programs, U.S. Department of Labor, Washington, D.C.

Sec. 7. *Instructions to individuals and organizations requesting advisory opinions relating to prohibited transactions and common definitions.* .01 [Reserved]

.02 [Reserved]

.03 [Reserved]

Sec. 8. *Conferences at the Department of Labor.* If a conference has been requested, and the Department determines that a conference is necessary or appropriate, the individual or organization or the authorized representative will be notified of the time and place of the conference. A conference will normally be scheduled only when the Department in its sole discretion deems it will be necessary or appropriate in deciding the case. If conferences are being arranged with respect to more than one request for an opinion letter involving the same individual or organization, they will be so scheduled as to cause the least inconvenience to the individual or organization.

Sec. 9. *Withdrawal of requests.* The individual or organization's request for an advisory opinion may be withdrawn at any time prior to receipt of notice that the Department intends to issue an adverse opinion, or the issuance of an opinion. Even though a request is withdrawn, all correspondence and exhibits will be retained by the

Department and will not be returned to the individual or organization.

Sec. 10. *Effect of Advisory Opinion*. An advisory opinion is an opinion of the Department as to the application of one or more sections of the Act, regulations promulgated under the Act, interpretive bulletins, or exemptions. The opinion assumes that all material facts and representations set forth in the request are accurate, and applies only to the situation described therein. Only the parties described in the request for opinion may rely on the opinion, and they may rely on the opinion only to the extent that the request fully and accurately contains all the material facts and representations necessary to issuance of the opinion and the situation conforms to the situation described in the request for opinion.

Sec. 11. *Effect of Information Letters*. An information letter issued by the Department is informational only and is not binding on the Department with respect to any particular factual situation.

Sec. 12. *Public inspection*. .01 Advisory opinions shall be open to public inspection at the Public Disclosure Room, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20216.

.02 Background files (including the request for an advisory opinion, correspondence between the Department and the individual or organization requesting the advisory opinion) shall be available upon written request. Background files may be destroyed after three years from the date of issuance.

.03 Advisory opinions will be modified to delete references to proprietary information prior to disclosure. Any information considered to be proprietary should be so specified in a separate letter at the time of request. Other than

proprietary information, all materials contained in the public files shall be available for inspection pursuant to section 12.02.

.04 The cost of search, copying and deletion of any references to proprietary information will be borne by the person requesting the advisory opinion or the background file.

Sec. 13. *Effective date.* This procedure is effective August 27, 1976, the date of its publication in the Federal Register.

Signed at Washington, D.C., this 24th day of August 1976.

JAMES D. HUTCHINSON,
Administrator of Pension and
Welfare Benefit Programs,
U.S. Department of Labor.

[*FR Doc. 76-25168 Filed 8-26-76; 8:45 am*]

* * *

Petition for Removal.

United States District Court, Central District of California.

Franchise Tax Board of the State of California, Plaintiff, vs. Construction Laborers Vacation Trust for Southern California, Edward Ashton, Al Atwood, Gary Bronneck, John Clarke, R. C. Gallyon, Richard Greenberg, Roger Jaska, William Middleton, Louie Bravo, Benjamin T. James, George Mattocks, William R. McClain, Nick Orsura, Joe Rivera, Ray M. Wilson, James Keyes, as Trustees and on behalf of Construction Does I to XXX, Inclusive, Defendants. No. 80 02741.

Filed: June 25, 1980.

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA:

The Petition of Defendants respectfully shows:

1. On June 13, 1980, an action was commenced against Petitioners in the Superior Court of the State of California, for the County of Los Angeles, entitled, "FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, Plaintiff, v. CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, EDWARD ASHTON, AL ATWOOD, GARY BRONNECK, JOHN CLARKE, R. C. GALLYON, RICHARD GREENBERG, ROGER JASKA, WILLIAM MIDDLETON, LOUIS BRAVO, BENJAMIN T. JAMES, GEORGE MATTOCKS, WILLIAM R. McCLAIN, NICK ORSURA, JOE RIVERA, RAY M. WILSON, JAMES KEYES, as trustees and on behalf of Construction Laborers Vacation Trust For Southern California, DOES I to XXX, Inclusive, Defendants", being Case No. C 326040, of the files and records of said

Court, by the filing of a Complaint and the issuance of a Summons thereon.

2. A copy of the Complaint and Summons thereon, attached hereto as Exhibit "A", and incorporated herein by reference, was served upon Defendants, other than the fictitious Defendants, on June 18, 1980. Defendants, Does I to XXX, Inclusive, are nominal Defendants. No further pleadings have been filed herein. No process has been served on any other Defendant.

3. The above-described action is a civil action involving an employee benefit plan and is an action over which this court has original jurisdiction under §403(c)(1) and §514 of the Employee Retirement Income Security Act of 1974, (29 U.S.C. 1103, 1104 and 1144.) This is action is properly removed to this Court by Petitioners, pursuant to the provisions of 28 U.S.C. §1441 without regard to the citizenship or residence of the parties.

4. This Petition is filed within thirty (30) days after Petitioners received copies of the Summons and Complaint, as required by 29 U.S.C. §1446(b).

5. Petitioners file herewith a Bond with good and sufficient surety, conditioned as provided by 28 U.S.C. 1446(d), that it will pay all costs and disbursements incurred by reason of the removal of the proceeding hereby brought, should it be determined that the action is not removable or is improperly removed.

WHEREFORE, Petitioners pray that the above action now pending against them in the Superior Court of the State of California, for the County of Los Angeles, be removed therefrom to this Honorable Court.

Dated this 20th day of June, 1980.

RICHMAN & GARRETT and
COX, CASTLE & NICHOLSON
By: /s/ Lionel Richman
LIONEL RICHMAN
Attorneys for Petitioners/Defendants

Civil Cover Sheet.

Plaintiffs

Franchise Tax Board of the State of California.

Attorneys (firm name, address, and telephone number)

George Deukmejian, Attorney General
Patti S. Kitching, Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, CA 90010
(213) 736-2104.

Defendants

Construction Laborers Vacation Trust for Southern California, Edward Ashton, Al Atwood, Gary Bronneck, John Clarke, R. C. Gallyon, Richard Greenberg, Roger Jaska, William Middleton, Louie Bravo, Benjamin T. James, George Mattocks, William R. McClain, Nick Orsura, Joe Rivera, Ray M. Wilson, James Keyes, as Trustees and on behalf of Construction Does I to XXX, Inclusive.

Attorneys (if known)

Lionel Richman of
Richman & Garrett
1336 Wilshire Boulevard
Los Angeles, CA 90017
(213) 483-7400

Basis of Jurisdiction.

Federal Question
(U.S. not a party)

CAUSE OF ACTION (Cite the U.S. Civil Statute under which you are filing and write a brief statement of cause)

Removal from State Court to U.S. District Court under Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001, et seq.

* * *

Memorandum of Points and Authorities in Opposition to Motion to Remand.

United States District Court, Central District of California.

Franchise Tax Board of the State of California, Plaintiff, vs. Construction Laborers Vacation Trust for Southern California, Edward Ashton, Al Atwood, Gary Bronneck, John Clarke, R. C. Gallyon, Richard Greenberg, Roger Jaska, William Middleton, Louie Bravo, Benjamin T. James, George Mattocks, William R. McClain, Nick Orsura, Joe Rivera, Ray M. Wilson, James Keyes, as Trustees and on behalf of Construction Does I to XXX, Inclusive, Defendants. Case No. 80-02741-R.

Date: October 6, 1980.

Time: 10:00 A.M.

Filed: September 26, 1980.

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I

INTRODUCTION

This is an action filed by the Franchise Tax Board of the State of California ("the Board") against the Construction Laborers Vacation Trust for Southern California ("the Trust") and its individual Trustees ("the Trustees").

The Trust is an express trust created pursuant to the provisions of a collective bargaining agreement entered into by the Southern California District Council of Laborers and four employers associations. Employers bound to collective bargaining agreements with the Southern California District Council of Laborers are required to pay specified sums into the Trust, for each hour worked by covered employees. These sums are accumulated in the accounts of individual employees, and are disbursed periodically by the Trustees pursuant to the provisions of a plan contained in the Trust Agreement. (Complaint, Exhibit A, Sections 1.01, 1.02, 6.02, 9.01 and 9.02.) The Trust Agreement contains "spendthrift" provisions which preclude the disbursal of accumulated contributions except in accordance with the terms of the Plan: "The money credited to a vacation account shall be subject to withdrawal and distribution only

at the times, in the manner and for the purposes specified in this Agreement." (Trust Agreement, Section 9.08.)

The suit filed by the Board alleges that three individuals (Murphy, Salcedo, and Zarate) are indebted to the State of California for personal income taxes. Each of the three individuals is alleged to be a beneficiary of the Trust, and the Board has attempted to satisfy their respective tax liabilities by filing Notices to Withhold with the Trust (pursuant to California Revenue and Taxation Code §18817) directing the Trustees to withhold and transmit to the Board any funds being held for the benefit of these individuals, up to the maximum amount of their State Income Tax liability.

* * *

The complaint alleges that in each instance, the Board has been notified that defendants "would not disburse the funds levied upon to either [Murphy, Salcedo or Zarate] or to the Board pending the receipt of an opinion letter from the Administrator, Pension and Welfare Benefit Programs, United States Department of Labor, as to whether defendants are permitted to honor said liens under the provisions of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA")." [Complaint, Paragraphs 9, 11 and 14.]

The complaint further alleges that on January 7, 1980, the defendants notified the Board that "the defendants would not honor the levies made upon them by the State of California pursuant to an advisory opinion from the United States Department of Labor." [Complaint, Paragraph 15.] The advisory opinion from the United States Department of Labor is attached as Exhibit H to the complaint. Its contents are extensively discussed in the Motion to Dismiss being heard concurrently with this motion. In

brief, the advisory opinion holds that the assets of the Trust are exempt from execution under the process of any state judicial or administrative agency because of the preemption provisions of ERISA.

The Board's complaint, in its second cause of action, seeks a declaratory judgment, stating the position of the parties to be as follows: "There was at the time of the levies alleged above and continues to be an actual controversy between the parties concerning their respective legal rights and duties. The Board contends that defendants are obligated and required by law to pay over to the Board all amounts held in the Construction Laborers Vacation Trust for Southern California in favor of the Board's delinquent taxpayers. On the other hand, defendants contend that Section 514 of ERISA preempts state law and that the Trustees lack the power to honor the levies made upon them by the State of California." [Complaint, Paragraph 19.]

The prayer of the Board's complaint requests "that the court declare defendants legally obligated to honor all future levies by the Board upon defendant Trust Fund in collection of tax delinquencies of the beneficiaries of defendant Trust Fund." [Complaint, Page 9, Lines 1-4.]

This action was originally filed in the Superior Court of the State of California for the County of Los Angeles. On June 26, 1980, the defendants caused this action to be removed to the United States District Court for the Central District of California.

The Petition for Removal filed with this court states that "the above described action is a civil action involving an employee benefit plan and is an action over which this court has original jurisdiction under Section 403(c)(1) and Section 514 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1103, 1104 and 1144). This action is

properly removed to this court by petitioners, pursuant to the provisions of 28 U.S.C. §1441 without regard to the citizenship or residence of the parties."

The plaintiff has now brought a Motion to Remand this action to State court, asserting an absence of jurisdiction in this court to hear the case.

For the reasons set forth below, the defendants oppose the Motion to Remand.

II

THIS ACTION IS ONE OVER WHICH THE FEDERAL COURTS HAVE ORIGINAL JURISDICTION, BECAUSE IT INVOLVES A CLAIM OR RIGHT "ARISING UNDER" THE LAWS OF THE UNITED STATES.

Any civil action of which the Federal District Courts would have original jurisdiction "founded on a claim or right arising under the Constitution, treaties or laws of the United States" is properly removable to U. S. District Court, if filed in a state court. 28 U.S.C. §1441(b).

The question of what types of cases "arise under" the laws of the United States is a troublesome one, which has generated much litigation over the years.

It is true, as the Board notes in its Motion, that the jurisdictional basis for the claim must be established by reference solely to the complaint. *Skelly Oil Co. vs. Phillips Petroleum Co.* (1950), 339 U.S. 667, 673-674; *Gully vs. First National Bank* (1936), 299 U.S. 109, 113; *Wong vs. Bacon* (N.D. Cal. 1977), 445 F. Supp. 1177, 1182.

In this case, as discussed above, the Board has made detailed and explicit reference to the provisions of ERISA in the allegations of the complaint, and the exhibits attached to the complaint. It is quite clear, from the contents of the complaint, that the entire focus of the dispute between the

parties is on whether ERISA preempts the Board's right to levy upon assets of the Trust.

Moreover, Ninth Circuit cases have held that it is no longer essential that the plaintiff make explicit reference to the provisions of federal law which are at issue, if it is clear from the contents of the complaint that a federal question exists. In *Sheeran vs. General Electric Co.*, 593 F. 2d 93 (9th Cir. 1979) the court sustained the removal to federal court of an action seeking increased pension benefits under the provisions of a collectively bargained pension agreement. After noting that federal jurisdiction would properly exist under Section 301(a) of the Taft Hartley Act for any suit for violation of a collective bargaining agreement, the court went on to hold that removal jurisdiction was not defeated by the failure of the plaintiff to make specific reference to Section 301(a) in its complaint.

Similarly, in *Fristoe vs. Reynolds Metals Company*, 615 F. 2d 1209 (9th Cir. 1980), the court upheld removal of a suit against an employer and a labor union, alleging various violations of common law rights. The court found that the characterization of plaintiff's rights set forth in his complaint was not controlling:

> "Fristoe contends his original state court complaint did not confer federal subject matter jurisdiction. Although he had not mentioned LMRA Section 301 in the complaint, and stylized his causes of action in common law terms, the court questioned him carefully to determine the nature of his claims. It is apparent from the allegations in his complaint and his responses to the court's questions that Fristoe was alleging that Reynolds wrongfully discharged him in breach of the collective bargaining agreement and that the union improperly handled his grievance. ***Mere omission of reference to LMRA Section 301 in the complaint does not***

> *preclude federal subject matter jurisdiction. The court's recharacterization of Fristoe's complaint as one arising under Section 301 is required by federal preemption doctrines.*" [Emphasis added]

It is abundantly clear, from the allegations quoted in Part I above, that the Board has raised the issue of whether ERISA preempts state law adequately in its complaint.

The Board's second contention is that federal question jurisdiction does not exist because the *remedy* invoked by the Board is conferred by state law (specifically, the California Revenue and Taxation Code).

However, it is now well settled that the controlling question is not whether the *remedy* is federally provided, but whether the determinative issues in the case necessarily require interpretation of federal law.

The U. S. Supreme Court has explicitly rejected the proposition that the "cause of action" must be one arising under federal law:

> "Although it has sometimes been suggested that the 'cause of action' must derive from federal law, it has been found sufficient that some aspect of federal law is essential to plaintiff's success. The litigation-provoking problem has been the degree to which federal law must be in the forefront of the case and not be remote, collateral or peripheral." *Association of Westinghouse Salaried Employees vs. Westinghouse Electrical Corporation*, 75 S. Ct. 489, 495, 348 U.S. 437, 450 (1955). (Plurality opinion of Frankfurter, J.)

The same approach was taken by the Second Circuit in *T. B. Harms Company vs. Eliscu*, 339 F. 2d 823 (2nd Cir. 1964).

In that case, the Second Circuit stated that "even though the claim is created by state law, a case may 'arise under' a law of the United States if the complaint discloses a need

for determining the meaning or application of such a law." 339 F. 2d at 827. That is exactly the posture of this case. The disposition of the Board's claim in this action will necessarily involve a determination of whether the provisions of ERISA, a complex and far reaching federal regulatory scheme, preclude the Board from levying upon the Trust's assets.

Similarly, in *Garrett vs. Time-D.C., Inc.*, 502 F. 2d 627 (9th Cir. 1974), the Ninth Circuit held that jurisdiction over a claim for prejudgment interest on shipping overcharges was properly cognizable by the federal courts, even though the explicit remedy sought rose under common law. The Ninth Circuit held that "it is enough that the statute provide the *source* of the right or duty claimed in the suit. See *Murphy vs. Colonial Federal Savings & Loan Association*, 388 F. 2d 609, 611, 615 (2nd Cir. 1967). To require more would establish an impossible and artificial line between statute and common law which nowhere in fact exists." 502 F. 2d at 630.

The modern cases have focused on the issue of whether interpretation of federal law would be determinative of the rights of the parties.

Thus, in *Gully vs. First National Bank* (1936), 299 U.S. 109, 112, it was held that federal question jurisdiction would exist when the right asserted was such that "it will be supported if the . . . laws of the United States are given one construction or effect, and defeated if they receive another."

This is clearly a case in which the right of the Board to levy tax assessments on the Trust "will be supported if the . . . laws of the United States are given one construction or effect, and defeated if they receive another." That, in fact, is the whole point of this lawsuit.

Other courts have adopted the so-called "pivotal question" formulation:

> "The Second Circuit has stated that the test of whether a complaint presents a federal question is 'whether the complaint is for a remedy expressly granted by an act of Congress or otherwise 'inferred' from federal law, or *whether a properly pleaded 'state created' claim itself presents a 'pivotal question of federal law,' for example because an act of Congress must be construed . . .*" *Ivy Broadcasting Co. vs. American Tel & Tel*, 391 F. 2d 486, 489 (2nd Cir. 1968). [Emphasis supplied]

The same test was adopted by the Third Circuit in *Warrington Sewer Company vs. Tracy*, 463 F. 2d 771 (3rd Cir. 1972).

The Board's next contention is that the application of ERISA to the facts of this case is purely a matter of defense, which is not a proper ground for the invocation of federal jurisdiction.

However, even where the federal questions is primarily a matter of defense, the courts have held jurisdiction to be proper, if the defendant could have brought its own declaratory judgment action in federal court to construe the controlling federal statute:

> "It is plain that the federal law that gives rise to a federal question must be an element of the plaintiff's complaint. The well pleaded complaint rule precludes taking jurisdiction on the basis of an anticipated federal defense. *However, a suit for a declaratory judgment that defendant does not have a right under federal law, in circumstances in which a coercive action by the defendant based on his supposed federal law right would be cognizable in federal court, is now held to be within federal question jurisdiction.*" [Emphasis

supplied.] 13 Wright and Miller, *Federal Practice and Procedure*, Section 3562, p. 413.

In this action, it is quite clear that the Trust and its Trustees could have brought a suit in federal court, to obtain declaratory relief regarding the right of the Trust to be free from state tax liens. The suit is in its present posture solely due to the happenstance that the Board elected to bring suit first. Regardless of the party initiating the suit, the "pivotal question" for decision is the same: whether ERISA preempts the right of the State of California to levy upon Trust assets.

This issue was addressed by the Ninth Circuit in *Shareholders Management Co. vs. Fred F. Gregory*, 449 F. 2d 326 (9th Cir. 1971).

In the *Shareholders Management* case, this court dismissed an action in which shareholders and other parties sought declaratory relief to adjudicate the validity of a claimed federal defense to an action pending in state court in California. The Ninth Circuit reversed, directing the court to retain the case and stay further proceedings pending the outcome of the state litigation. The Ninth Circuit held that should the state court fail to adjudicate the federal defense, the shareholders should have a right to litigate the issue in federal court. The existence of the federal question raised by shareholders was held sufficient to sustain jurisdiction.

III

IN SUITS ARISING UNDER FEDERAL STATUTES REGULATING COMMERCE, INCLUDING ERISA, NO MINIMUM AMOUNT NEED BE IN DISPUTE TO SUSTAIN JURISDICTION.

Although it is not raised in the Board's Motion to Remand, it is important to note, in passing, that no serious issue can arise in this case regarding the sufficiency of the amount in dispute.

Although the Board's suit concerns three quite small tax delinquencies, the decision of the court will necessarily foreclose any legal question in the future regarding the right (or lack thereof) of the Board to levy on the Trust's assets. Thus, the actual amount at stake in this case is large indeed.

Although 28 U.S.C. §1331 requires that at least $10,000.00 be in dispute to sustain a claim for federal jurisdiction of a case "arising under" the Constitution or the laws of the United States, the minimum jurisdictional amount does not apply in any case arising "under any Act of Congress regulating commerce." 28 U.S.C. §1337.

This statutory provision has been interpreted in an extremely broad manner:

> "The courts have found in §1337 of the Code, and its predecessors, support for jurisdiction without an amount requirement in so many different kinds of suits that it seems fair to say that that section of the Code grants jurisdiction whenever suit is under an Act whose Constitutional basis is the commerce clause." Wright, *Federal Courts* (Third Edition), p. 124.

ERISA is clearly among the Acts of Congress which regulate commerce between the states. Moreover, it has been held that "to found jurisdiction upon Section 1337, it is not requisite that the commerce clause be the exclusive source of federal power; it suffices that it be a significant one." *Murphy vs. Colonial Federal Savings and Loan Association*, 388 F. 2d 609, 615 (2nd Cir. 1967).

Therefore, no serious claim can be made in this case that jurisdiction is lacking because of the absence of a claim for the requisite jurisdictional amount.

IV

THE COURT HAS THE POWER, IF NECESSARY, TO REALIGN THE CLAIMS OF THE PARTIES IN ORDER TO BRING THE FEDERAL ISSUE INTO PROPER FOCUS.

As already noted, the complaint filed by the Board herein adequately raises the federal question which is the focus of this litigation. We therefore believe there is no reason for the court to direct realignment of the parties to properly define the federal issues.

Nevertheless, it is noteworthy that one federal district court in California has ordered such a realignment in a case involving (as this one does) a trust fund created by collective bargaining and important issues of federal law arising under ERISA.

In *Wong vs. Bacon*, 445 F. Supp. 1177 (N.D. Cal. 1977) the court found that plaintiff's original complaint, seeking restitution of improper trust fund payments under California common law, did not adequately raise a federal issue, but that the answer of the defendant trustees raised important federal questions under ERISA. Rather than dismiss the action, the court elected to view the defendant's answer as a "counterclaim for a declaratory judgment against plaintiffs." Having realigned the parties in this fashion, the court found that the court-created "counterclaim" adequately raised a federal question and that jurisdiction was proper.

No such judicial legerdemain is necessary in this action. However, the *Wong* case is noteworthy because it emphasizes the lengths to which federal courts will go to retain jurisdiction over important federal questions involving interpretation of ERISA.

Public policy will be badly served if federal courts attempt to avoid interpreting critical issues of federal law in cases

such as this. The state courts are unequipped to deal, on a piecemeal basis, with the difficult and unresolved federal issues arising under complicated federal statutory schemes. To relegate such questions to the state courts may have the temporarily salutary effect of reducing the federal court workload, but the long-term result will be a patchwork of wildly inconsistent state court decisions on important federal statutory issues.

V

AN INDEPENDENT BASIS FOR JURISDICTION EXISTS UNDER THE LABOR MANAGEMENT RELATIONS ACT.

Section 301(a) of the Labor Management Relations Act of 1947 (the Taft-Hartley Act) provides as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties."

The Ninth Circuit has held that trust agreements entered into as a result of collective bargaining are "contracts between an employer and a labor organization" within the meaning of Section 301(a), and that jurisdiction exists even if the employer and the labor organization are not parties to the suit:

> "Lillian's first response as at Section 301 is limited to suits between unions and employers and does not cover suits by beneficiaries of workers against the trustees or trust funds. This response is without merit. Section 301 jurisdiction is not dependent upon the parties to the suit but rather the nature or subject matter of the

> action. Jurisdiction exists as long as the suit is for violation of a contract between a union and employer *even if neither party is a union or an employer.*" [Emphasis supplied] *Rehmar vs. Smith*, 555 F. 2d 1362, 1366 (9th Cir. 1977).

In determining whether a suit is properly brought pursuant to the provisions of Section 301, the presence or absence of a specific reference to Section 301 in the complaint is not determinative. See *Fristoe vs. Reynolds Metals Company*, 615 F. 2d 1209 (9th Cir. 1980).

In this case, the Board seeks declaratory relief determining whether, consistent with the terms of the Trust Agreement (Exhibit A to the Complaint), the Trustees may be required to respond to state tax levies. The resolution of this issue will necessarily involve interpretation and application of the Trust Agreement created by the collective bargaining parties. This is precisely the type of adjudication which Section 301 encompasses.

Thus, even if the court were not confronted with the "pivotal" question of whether the Board's rights are preempted by ERISA, an adequate ground for the assertion of federal jurisdiction would nevertheless exist.

VI

CONCLUSION

For the reasons set forth herein, the Motion to Remand should be denied.

DATED: September 24, 1980

COX, CASTLE & NICHOLSON

By /s/ James P. Watson

James P. Watson,

Attorneys for Petitioners/Defendants

(Note — Proof of Service by Mail omitted in printing.)

Order Denying Motion to Remand.

United States District Court, Central District of California.

Franchise Tax Board of the State of California, Plaintiff, vs. Construction Laborers Vacation Trust for Southern California, et al., Defendants. Case No. 80-02741-R.

Filed: October 16, 1980.

The motion of plaintiff Franchise Tax Board of the State of California for an order remanding the within action to the Superior Court of the State of California for the County of Los Angeles came on for hearing in this court on Monday, October 6, 1980, at 10:00 A.M.

The court having reviewed the motion and documents filed in support thereof, and the written opposition thereto, and having heard the oral arguments of counsel, it is hereby ORDERED, that said motion be denied.

DATED: Oct. 16, 1980

[stamp] MANUEL L. REAL
Manuel L. Real, United States
District Judge

Supreme Court of the United States

No. 82-695

Franchise Tax Board of the State of California, Appellant, v. Construction Laborers Vacation Trust for Southern California, et al.

APPEAL from the United States Court of Appeals for the Ninth Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

December 13, 1982

FILED
NOV 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-695
IN THE

Supreme Court of the United States

October Term, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION OF APPELLEES TO DISMISS APPEAL OR IN THE ALTERNATIVE, TO AFFIRM THE DECISION BELOW.

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Questions Presented.

1. Does the United States District Court possess subject matter jurisdiction, under the provisions of 28 U.S.C. Sections 1331, 1441(a) and 1337, of a lawsuit filed by a state agency against a trust fund regulated pursuant to the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001, *et seq.* ("ERISA") where the complaint specifically seeks a declaratory judgment that the pre-emptive provisions of ERISA do not immunize the trust fund from the imposition of liens created by state law, and where the agency specifically challenges an advisory opinion of the U.S. Department of Labor finding that the trust fund is immune from such levies?

2. Do the provisions of Section 514 of ERISA, 29 U.S.C. Section 1144, explicitly or impliedly preempt the right of the State of California to levy on the assets of an employee benefit trust fund subject to regulation under ERISA, where the State's levy would interfere with the purposes for which the trust fund was created and would impose administrative expenses and burdens upon the trust fund unauthorized by federal law?

Parties to This Action.

The parties to this action are:

1. The Franchise Tax Board of the State of California.
2. The Construction Laborers Vacation Trust for Southern California.
3. Edward Ashton.
4. Al Atwood.
5. Gary Bronneck.
6. John R. Clarke.
7. R.C. Gallyon.
8. Richard Greenberg.
9. Roger Jaska.
10. William Middleton.
11. Tony Hoffman.
12. William R. McClain.
13. Armando Lopez.
14. Joe Rivera.
15. Ray M. Wilson.
16. James Keyes.
17. Boyd McDougal.
18. Carlos Cerna.

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No. 82-695

IN THE

Supreme Court of the United States

October Term, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,
Appellees.

MOTION OF APPELLEES TO DISMISS APPEAL OR IN THE ALTERNATIVE, TO AFFIRM THE DECISION BELOW.

I.
PRELIMINARY STATEMENT.

Appellees Construction Laborers Vacation Trust for Southern California ("CLVT") and its Trustees, Edward Ashton, Al Atwood, Gary Bronneck, John R. Clarke, R.C. Gallyon, Richard Greenberg, Roger Jaska, William Middleton, Tony Hoffman, William R. McClain, Armando Lopez, Joe Rivera, Ray M. Wilson, James Keyes, Boyd McDougal and Carlos Cerna hereby move to dismiss the appeal filed and docketed in this Court in the within action, or, in the alternative, to affirm the decision of the U.S. Court of Appeals for the Ninth Circuit.

The alternative motions are made on each and all of the following grounds:

1. This Court lacks jurisdiction over this appeal, which does not raise a substantial Federal question.

2. If the Court should find that jurisdiction lies to hear this appeal, the decision of the United States Court of Appeals for the Ninth Circuit should be summarily affirmed; the issues raised by the appellant on appeal are without merit.

3. Probable jurisdiction of the appeal should not be noted because the decision of the Court of Appeals for the Ninth Circuit is consistent with statutory and case law.

4. Appellant lacks standing to pursue its claim that 28 U.S.C. Section 1144 violates the Tenth Amendment to the U.S. Constitution. The issue was never raised or decided below.

II.
OPINIONS BELOW.

The opinion of the U.S. Court of Appeals for the Ninth Circuit was filed on June 22, 1982; it is reported at 679 F.2d 1307 (Appendix A to Jurisdictional Statement). The Order of the U.S. Court of Appeals for the Ninth Circuit denying the Petition for Rehearing was filed on July 21, 1982 and is not officially reported (Appendix D to the Jurisdictional Statement). The Judgment of the U.S. District Court for the Central District of California was entered on December 4, 1980; it is not officially reported (Appendix B to the Jurisdictional Statement).

III.
STATUTES INVOLVED.

In addition to the statutes set forth in the Jurisdictional Statement of the Franchise Tax Board, the following statutes are material to this proceeding:

1. 29 U.S.C. Section 1103(c)(1), which provides, in pertinent part:

> "... [T]he assets of a plan ... shall be held for the exclusive purposes of providing benefits to participants

in the plan and their beneficiaries and defraying reasonable expenses of administering the plan."

2. 29 U.S.C. Section 1104(a)(1), which provides, in pertinent part:

". . . A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) For the exclusive purposes of: (i) providing benefits to participants and their beneficiaries and (ii) defraying reasonable expenses of administering the plan; . . . (and)

(D) In accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter."

IV.
PROCEEDINGS BELOW.

This is an action instituted by the Franchise Tax Board of the State of California ("the Board") against the Construction Laborers Vacation Trust for Southern California ("CLVT") and its individual Trustees ("Trustees"). The action was originally filed in the Superior Court of the State of California for the County of Los Angeles. Within thirty days after service of the action, the CLVT and the Trustees filed a Petition for Removal of the action to the United States District Court for the Central District of California. The Board filed a Motion for Remand, which was denied by the U.S. District Court.

The CLVT filed a Motion to Dismiss the Complaint, together with a supporting memorandum. The Board timely filed a written opposition to the Motion to Dismiss. The U.S. District Court elected, with the consent of the parties, to treat the Motion to Dismiss as if cross-motions for summary judgment had been filed. Treating the Motion to Dismiss in this fashion, the District Court granted summary

judgment in favor of the Board and denied summary judgment to the CLVT.

The CLVT filed a timely Notice of Appeal, and the case was briefed and argued before a panel of the U.S. Court of Appeals for the Ninth Circuit. On June 22, 1982, the Court of Appeals issued a decision, one judge dissenting, reversing the decision of the U.S. District Court and remanding the case for further proceedings.

The Board filed a Notice of Appeal to the Supreme Court of the United States on September 17, 1982 with the clerk of the U.S. Court of Appeals for the Ninth Circuit. On October 18, 1982, the appeal was docketed, and the Board's Jurisdictional Statement was filed.

V.
STATEMENT OF FACTS.

The facts in the within action are undisputed. The following facts appear in the Complaint in this action:[1]

1. This is an action instituted by the Franchise Tax Board of the State of California (the "Board") against the Construction Laborers Vacation Trust for Southern California ("CLVT") and its Trustees ("Trustees"). The action seeks to obtain a declaratory judgment that it is empowered to issue Notices to Withhold, under the provisions of California Revenue & Taxation Code Section 18817, to employee benefit trust funds governed by the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA").

2. The CLVT is an employee benefit Trust, established through collective bargaining between the Southern California District Council of Laborers (the "Union") and various employers' associations. (See Complaint, Appendix "A," Exhibit "A".)

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[1]A copy of the Complaint, and pertinent portions of the exhibits appended thereto, appear as Appendix "A" to this motion.

3. The CLVT is administered by a Board of Trustees, eight of whom are designated by the Union, and eight of whom are designated by the employers' associations. (*Id.*)

4. Employers bound to collective bargaining agreements with the Union are obligated to make contributions to the CLVT for each hour of work performed by laborers whose work is covered by such agreements. (*Id.*)

5. The Trustees of the CLVT administer the CLVT pursuant to the terms of a Trust Agreement promulgated by the settlors of the Trust. (*Id.*)

6. The contributions made by employers to the CLVT are accumulated by the CLVT, which maintains a "vacation account" for each covered laborer. Annually, at a time specified by the Trustees, a check for the accumulated vacation benefits is paid to each covered employee, when the employee has satisfied the requirements set forth in the Trust Agreement. (*Id.*)

7. The CLVT is a type of forced savings plan, or "spendthrift" trust designed to insure that the beneficiaries (individual laborers) do not dissipate the benefits they are eligible to receive through the Trust until they are actually eligible for each year's lump sum payment. The Trust Agreement contains stringent provisions designed to insure that covered workmen do not use their Trust accounts to obtain credit or otherwise dispose of the sums payable to them before they are actually received.[2]

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[2]Article 9.08 of the Trust Agreement provides:

"It is the intent and purpose of the Plan, and of this Agreement, and a material part of the consideration for the making of contributions to the Fund by individual employers, that the money in each vacation account shall be received by the employee entitled thereto *personally*. Accordingly, *no payments due the Fund and no monies in the vacation accounts established pursuant to the Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge by any employee or other person and any such anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge shall be void and ineffective*. The money credited to a vacation account shall be subject to withdrawal and distribution *only* at the

(footnote continued on following page)

8. From time to time, the CLVT receives Notices to Withhold, issued by the Board, seeking to require the CLVT to set aside funds which the Board claims individual laborers owe the State of California in back taxes and/or penalties.[3]

9. The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1001, *et seq.*, regulates the operation of "employee benefit plans." It is un-

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times and *in the manner* and *for the purposes* specified in this Agreement." [Emphasis supplied.]

Similarly, Section 4.06 of the Trust Agreement provides:

"Each employee or beneficiary under the Plan is hereby restrained from selling, transferring, anticipating, assigning, hypothecating or otherwise disposing of his benefits hereunder or any other right or interest under the Plan, and the Board of Trustees shall not recognize, or be required to recognize, any such sale, transfer, anticipation, assignment, hypothecation or other disposition. Any such benefit, right or interest shall not be subject in any manner to voluntary transfer *or transfer by operation of law* or otherwise, and shall be exempt from the claims of creditors or other payments and from all orders, decrees, garnishments, executions or other legal or equitable process of proceedings to the fullest extent permissible by law."

[3]The authority of the Board to issue such Notices to Withhold is contained in California Revenue & Taxation Code Section 18817, which provides:

"The Franchise Tax Board may by notice, served personally or by first class mail, require any employer, person, officer or department of the State, political subdivision or agency of the State . . . having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer . . . to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer . . . and to transmit the amount withheld to the Franchise Tax Board at such times as it may designate."

disputed that vacation trusts like the CLVT are "employee welfare benefit plans" within the meaning of ERISA.[4]

10. In order to determine whether the Trust is obligated to respond to the process of state judicial and administrative agencies seeking to levy upon benefits due beneficiaries of the Trust, co-counsel for the Trust wrote to the U.S. Department of Labor, which is charged with administering portions of ERISA, to request an advisory opinion. On December 28, 1979, the U.S. Department of Labor issued an advisory opinion stating, in pertinent part:

> "It is the position of the Department of Labor that the process of any state judicial or administrative agency seeking to levy for unpaid taxes or unpaid unemployment insurance contributions upon benefits due a participant or beneficiary under the Plan is preempted under ERISA §514."[5] (App. "A," Exh. "H.")

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[4]29 U.S.C. Section 1002(1) provides, in pertinent part:

"The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or *vacation benefits*, apprenticeship or other training programs . . ."

29 U.S.C. Section 1002(3) goes on to provide:

"The term 'employee benefit plan' or 'plan' means an employee benefit plan or an employee pension plan or a plan which is both an employee benefit plan and an employee pension plan."

[5]Section 514 of ERISA, 28 U.S.C. Section 1144, provides, in pertinent part, as follows:

"(a) Except as provided in subsection (b) of this section, the provisions of this title and Title IV shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in Section IV(a) and not exempt under Section IV(b). This section shall take effect January 1, 1975 . . .

* * *

(footnote continued on following page)

11. The Advisory Opinion of the Department of Labor concludes that the garnishment by state agencies of the assets of ERISA-regulated trust funds would be inconsistent with the provisions of Sections 403(c) and 404(a)(1) of ERISA, which generally forbid the disbursement of trust fund assets except to provide benefits and defray trust fund expenses.[6]

12. Based on the advisory opinion letter issued by the U.S. Department of Labor, the CLVT has not processed the Notices to Withhold issued by the Board.

VI.
ARGUMENT.

A. The U.S. District Court Properly Assumed Jurisdiction of This Action.

This action was originally filed in the Superior Court of the State of California for the County of Los Angeles. On June 26, 1980, the CLVT and the Trustees filed a Petition for Removal of the action to the U.S. District Court for the

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(c) For purposes of this section:

(i) The term 'state law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any state. A law of the United States applicable only to the District of Columbia shall be treated as a state law rather than a law of the United States.

(ii) The term 'state' includes a state, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, *directly or indirectly*, the terms and conditions of employee benefit plans covered by this title." [Emphasis supplied.]

[6]Section 403(c) of ERISA provides, in pertinent part, that "The assets of a plan . . . shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. Section 1103(c)(1).

Section 404(a)(1) of ERISA provides, in pertinent part, that

". . . A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan." 29 U.S.C. Section 1104(a)(1).

Central District of California. The Petition for Removal recites, *inter alia*, that removal jurisdiction is proper pursuant to the provisions of 28 U.S.C. Section 1441.

Any civil action of which the federal district courts would have original jurisdiction "founded on a claim or right arising under the Constitution, treatise or laws of the United States" is properly removable to a U.S. District Court, if filed in a state court. See 28 U.S.C. Section 1441(b).

The question of what types of cases "arise under" the laws of the United States is a troublesome one, which has generated much litigation. As the Board notes in its Jurisdictional Statement, it has generally been held that the jurisdictional basis for the claim must be established by reference solely to the complaint. See *Skelley Oil Co. v. Phillips Petroleum Co.* (1950), 339 U.S. 667, 673-674; *Gully v. First National Bank* (1936), 299 U.S. 109, 113; *Wong v. Bacon* (N.D. Cal. 1977), 445 F.Supp. 1177, 1182.

In the present case, the Complaint makes detailed and explicit reference to the provisions of ERISA on which the present dispute turns. The Board alleges, in its Complaint, that it has issued Notices to Withhold, pursuant to California Revenue & Taxation Code Section 18817, to the CLVT and that the CLVT has notified the Board that it "would not disburse the funds levied upon to either [the Trust beneficiaries involved] or to the Board pending the receipt of an opinion letter from the Administrator, Pension and Welfare Benefit Programs, United States Department of Labor, as to whether defendants are permitted to honor said liens under the provisions of the Employee Retirement Income Security Act of 1974." (See Complaint, App. "A," Paras. 9, 11 and 14.)

The Complaint further alleges that on January 7, 1980, the CLVT notified the Board that "the defendants would not honor levies made upon them by the State of California pursuant to an advisory opinion from the United States Department of Labor." (Complaint, App. "A," Para. 15.)

The U.S. Department of Labor's advisory opinion is attached as Exhibit H to the Complaint. The opinion letter extensively discusses the application of the preemptive provisions of ERISA to the facts of this case, and holds that the assets of the Trust are exempt from execution under the process of any state, judicial or administrative agency because of the general preemptive provisions of ERISA. (App. "A," Exh. "H.")

Thus, there can be no serious question that the Complaint and the exhibits incorporated therein, fully raise the federal question at issue in this case.

The Board appears to contend that federal question jurisdiction does not exist because the *remedy* invoked by the Board is conferred by state law. However, it is now well settled that the controlling question is not whether the *remedy* is federally provided, but whether the determinative issues in the case necessarily require interpretation of federal law. This Court has explicitly rejected the proposition that the "cause of action" must be one arising under federal law.[9]

In *Gully v. First National Bank*, 299 U.S. 109, 112 (1936), relied upon by the Board, it was held that federal question jurisdiction would exist when the right asserted was such that "it will be supported if the . . . laws of the United States are given one construction or effect, and defeated if they receive another." This is clearly a case in which the right of the Board to levy tax assessments on the CLVT "will be supported if the . . . laws of the United States are given one construction or effect, and defeated if

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[9] "Although it has sometimes been suggested that the 'cause of action' must derive from federal law, it has been found sufficient that some aspect of federal law is essential to plaintiff's success. The litigation-provoking problem has been the degree to which federal law must be in the forefront of the case and not the remote, collateral or peripheral." *Association of Westinghouse Salaried Employees v. Westinghouse Electrical Corporation*, 348 U.S. 437, 450, 75 S.Ct. 489, 495 (1955). [Plurality opinion of Frankfurter, J.]

they receive another." That, in fact, is the whole point of this lawsuit.

The circuit courts of appeal have also expressed the view that the remedy sought is not determinative. In *T.B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964), the Second Circuit Court of Appeals stated that "even though the claim is created by state law, a case may 'arise under' a law of the United States if the complaint discloses a need for determining the meaning or application of such a law." 339 F.2d at 827.[10]

The Board seeks to avoid the application of these time-tested principles by arguing that the application of ERISA to the facts of this case is purely a matter of defense, which is not a proper ground for the invocation of federal jurisdiction. Even where the federal question is primarily a matter of defense, however, the courts have held jurisdiction to be proper, if the defendant could have brought its own declaratory judgment action in federal court to construe the controlling federal statute:

> "It is plain that the federal law that gives rise to a federal question must be an element of the plaintiff's

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[10]Other courts have adopted the so-called "pivotal question" formulation:

> "The Second Circuit has stated that the test of whether a complaint presents a federal question is 'whether the complaint is for a remedy expressly granted by an act of Congress or otherwise "inferred" from federal law, or whether a properly pleaded "state created" claim itself presents a "pivotal question of federal law," for example because an act of Congress must be construed' . . . ." *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486, 489 (2d Cir. 1968).

Essentially the same test was adopted by the Third Circuit in *Warrington Sewer Company v. Tracy*, 463 F.2d 771 (3d Cir. 1972); *see also Garrett v. Time-D.C., Inc.*, 502 F.2d 627 (9th Cir. 1974).

See also Mountain Fuel Supply Co. v. Johnson, 586 F.2d 1375, 1381 (10th Cir. 1978); *Lindy v. Lynn*, 501 F.2d 1367, 1369 (3d Cir. 1974); *Sweeny v. Abramovitz*, 449 F.Supp. 213 (D. Conn. 1978). *See generally*, Note, "The Outer Limits of 'Arising Under,' " 54 NYU L.Rev. 978 (1979).

> complaint. The well-pleaded complaint rule precludes taking jurisdiction on the basis of an anticipated federal defense. However, a suit for a declaratory judgment that defendant does not have a right under federal law, in circumstances in which a coercive action by the defendant based on his supposed federal law right would be cognizable in federal court, is now held to be within federal question jurisdiction." 13 Wright & Miller, *Federal Practice & Procedure*, Section 3562 (West 1975).

In this action, it is quite clear that the CLVT and its Trustees could have brought a suit in federal court, to obtain a declaratory relief regarding the right of the CLVT to be immune from garnishment orders issued by state agencies.[11] The suit is in its present posture solely due to the happenstance that the Board elected to bring suit first. Regardless of the party initiating the declaratory relief action, the "pivotal question" for a decision is the same: Whether ERISA preempts the right of the State of California to levy upon trust assets. *Cf. Shareholders Management Co. v. Fred F. Gregory*, 449 F.2d 326 (9th Cir. 1971).

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[11]Federal courts have occasionally realigned the claims of the parties in order to eliminate any question regarding the propriety of federal jurisdiction. In *Wong v. Bacon*, 445 F.Supp. 1177 (N.D. Cal. 1977), a U.S. District Court found that the plaintiffs' original complaint, seeking restitution of improper trust fund payments under California law, did not adequately raise a federal issue. However, the answer of the defendant trustees raised important federal questions under ERISA. Rather than dismiss the action, the U.S. District Court elected to view the defendants' answer as a "counterclaim for a declaratory judgment against plaintiffs." Having characterized the pleadings in this fashion, the Court found that the Court-created "counterclaim" adequately raised a federal question and that jurisdiction was proper. No such judicial legerdemain was necessary in this action. The Board's Complaint clearly raises the federal issue. However, the *Wong* case is noteworthy because it demonstrates that federal courts recognize the important federal legal issues at stake in cases raising the issue of preemption under ERISA.

The assumption of jurisdiction by the U.S. District Court in this case is consistent with the foregoing decisions, and with considerations of public policy. Obviously, the result in this action depends entirely upon the interpretation of a complex piece of federal legislation. Federal courts possess the experience and expertise to treat difficult questions of preemption. Such questions have been routinely raised and resolved in federal court proceedings. See, *e.g.*, *Lafferty v. Solar Turbines International*, 666 F.2d 408 (9th Cir. 1982); *Armco, Inc. v. Ludwick*, 3 EBC 1574 (D. Kan. 1982); *Hotel and Restaurant Employees v. Danzinger*, 3 EBC 1552 (D. N.J. 1982); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895 (1981); *Delta Airlines, Inc. v. Kramarsky*, 666 F.2d 21 (2d Cir. 1982).

B. The Court of Appeals Correctly Held That the State's Right to Garnish Trust Assets Is Preempted by ERISA.

1. Section 514's Preemption of State Law Is Plainly Worded and Is Virtually Total.

The extreme breadth of federal preemption intended by Congress in enacting ERISA is manifest in the language of Section 514, quoted *supra*. Section 514(b) expressly enumerates the *only* categories of state laws saved from the otherwise total preemption of Section 514(a). These enumerated exceptions in no way protect the California laws in question. Indeed, subsection (4) of Section 514(b) further evidences the pervasiveness of the provision's basic preemption by providing:

> Subsection (a) of this section shall not apply to any generally applicable *criminal* law of a State.

29 U.S.C. Section 1144(b)(4). (Emphasis added.) There is no such general provision relating to civil laws.

The legislative intent underlying ERISA preemption is clear. Rejecting narrower formulations of preemption, Congress adopted Section 514 with the express intent of fore-

closing "endless litigation" over the "perimeters of preemption."[12]

Congress was cognizant of the potential consequences inherent in its foreclosing litigation over the scope of Section 514. It recognized that its abrogation of the judiciary's power to define preemption on a case-by-case basis could result in unanticipated distortions. Accordingly, Congress provided a safety valve, a forum for consideration of such cases. That forum was not the courts, however; *it was Congress itself*. In Section 3022 of ERISA, Congress instructed the Joint Pension Task Force to monitor the effects and continuing desirability of its broad federal preemption of state laws relating to plans and to report the findings back to Congress for review and possible action. ERISA Section 3022(a)(4); (29 U.S.C. Section 1222(a)(4)).

In enacting ERISA, Congress burdened employee benefit plans with complicated and costly administrative and structural requirements regarding disclosure, fiduciary responsibility and other matters for the purpose of protecting plan participants. At the same time Congress acknowledged that employee benefit plans were voluntary and that ERISA had to be tailored *whenever possible* to reduce the burdens upon the plans. Congress expressly noted that disregard of this latter reality could produce an anomalous result. The statute

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[12]A number of commentators have urged that the preemption provisions of ERISA be read broadly. See, *e.g.*, Hutchinson and Ifshin, "*Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974*," 45 U.Chi.L.Rev.23 (1978):

> "We conclude that Congress intended to preempt almost all state regulation of employee pension and welfare benefit plans, but that courts have often defined the scope of preemption more narrowly where preemption may create what appear to be undesirable regulatory lacunae or supersede state law in fields traditionally left to state governance. We argue that this continued whittling away of the preemptive reach of ERISA seriously threatens the regulatory scheme devised by Congress, and that it is up to Congress, not the courts, to narrow ERISA's preemption of state law where particular policy reasons make such action appropriate." *Id.* at 23-24.

designed to protect plan participants could prompt termination of the very plans in which they participate — in legislating the laying of golden eggs, Congress could kill the goose. *See* S. Rep. No. 383, 93rd Cong., 2d Sess. 18-19 (1973).

The Congressional mandate to the judiciary is thus clear in language, in legislative history, and in motive. Until further notice from Congress, ERISA's preemption of state law is inviolate. To the extent California's laws relate to employee benefit plans, they are preempted.

2. Congress Intended Section 514's Total Preemption to Be Given Full Effect by the Judiciary.

The legislative history of ERISA establishes that Congress intended the exceptional preemptive sweep evoked by the "plain words" of Section 514 to be given full effect. During the legislative hearings which preceded the enactment of ERISA, both houses of Congress were considering versions of a bill to regulate employee benefit plans. H.R. 2 (93rd Cong., 1st Session (1973)), from which the language of ERISA is largely derived, originally contained a preemption provision which was limited in scope. However, during the course of Joint House-Senate Conference Committee hearings to draft the final version of ERISA, a much more sweeping preemption provision was substituted. The Conference Report explains:

> Under the substitute, the provisions of Title I are to supersede all state laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce.

S. Rep. 1090 [H. Rep. 1280], 93rd Cong., 2d Sess. 383 (1974) *reprinted in* "Legislative History of the Employee Retirement Income Security Act of 1974," Committee

Print, 94th Cong., 2d Sess. 4650 (1976) (hereinafter "*Legislative History*").[13]

The remarks of Senator Jacob Javits, bill co-sponsor and senior minority member of the Senate Committee on Labor and Public Welfare, further amplify and delineate the Congressional preemptive scheme in ERISA. Senator Javits stated:

> Both House and Senate bills provided for preemption of state law, but — with one major exception appearing in the House bill — defined the perimeters of preemption in relation to the areas *regulated* by the bill. Such a formulation raised the possibility of endless litigation over the validity of state action that might impinge

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[13]Senator Harrison Williams, Jr., bill co-sponsor and Chairman of the Senate Committee on Labor and Public Welfare, issued the following explanatory statement regarding the preemptive provisions of ERISA:

> It should be stressed that, with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for federal regulation, thus eliminating the threat of conflicting or inconsistent state and local regulation of employee benefit plans. This principle is intended to apply *in its broadest sense* to all actions of state or local governments, or any instrumentality thereof, which have the force or effect of law. [Emphasis supplied].

120 Cong. Rec. 2933 (1974); *Legislative History* at 4745-46.

Congressman John Dent, Chairman of the Subcommittee on Labor of the House Labor and Education Committee, sounded the same note:

> Finally, I wish to make note of what is to many the crowning achievement of this legislation, *the reservation to federal authority of the sole power to regulate the field of employee benefit plans*. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent state and local regulation . . . The conferees, *with the narrow exceptions specifically enumerated, applied this principle in its broadest sense* to foreclose any non-federal regulation of employee benefit plans. Thus, the provisions of Sec. 514 would reach any rule, regulation, practice or decision of any state, subdivision thereof, or any agency or instrumentality thereof — including any professional society or association operating under color of law — which would *affect* any employee benefit plan as described under Sec. 4(a) and not exempt under Sec. 4(b). [Emphasis supplied].

120 Cong. Rec. 29197 (August 20, 1974); *Legislative History* at 4670.

upon federal regulation, as well as opening the door to multiple and potentially conflicting state laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected with the federal regulatory scheme.

Although the desirability of further regulation — at either the state or federal level — undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive federal interest and interests of uniformity with respect to interstate plans required — but for certain exceptions — the displacement of state action in the field of private employee benefit programs.

The conferees — recognizing the dimensions of such a policy — also agreed to assign the Congressional Pension Task Force the responsibility of studying and evaluating preemption in connection with State authorities and reporting its findings to the Congress. If it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made.

120 Cong. Rec. 29942 (August 22, 1974); *Legislative History* at 4770-71.

3. Other Courts Have Not Hesitated to Recognize the Breadth of ERISA's Preemption of State Law.

Numerous court decisions have recognized the broad reach of ERISA's preemption provisions;[14] see *Hewlett-Packard Co. v. Barnes*, 425 F.Supp. 1294 (N.D. Cal 1977),

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[14]The only area in which the majority of courts have failed to find that ERISA preempts state laws which impinge upon the operation of ERISA-regulated trusts is that of domestic relations. In *Stone v. Stone*, 450 F.Supp. 919 (N.D. Cal. 1978), *aff'd.* 632 F.2d 740, a U.S. District Court held that the preemption provisions of ERISA did not preempt California community property laws which might require a spouse to pay a portion of his trust benefits to an ex-spouse or dependent. How-

(footnote continued on following page)

aff'd. 571 F.2d 502 (9th Cir. 1978); *Bell v. Employee Security Benefit Association,* 437 F.Supp. 382 (D. Kansas 1977); *Standard Oil Co. of California v. Agsalud,* 442 F.Supp. 695 (N.D. Cal. 1977), *aff'd.* 633 F.2d 760 (9th Cir. 1980); *Buczynski v. General Motors Corp.,* 616 F.2d 1238 (3d Cir. 1980), *aff'd. sub nom. Alessi v. Raybestos-Manhattan, Inc.,* 451 U.S. 504, 101 S.Ct. 1895 (1981).

The general view of the majority of courts was aptly expressed in the *Bell* decision, *supra:* "In light of this legislative history, we conclude that federal preemption in the area of pensions and other employee benefit programs is virtually total." 437 F.Supp. at 387.

4. The California Garnishment Laws at Issue Directly Encroach Upon the Provisions of ERISA Regulating the Disbursal of Trust Monies.

Sections 403(c)(1) and 404(a)(1) of ERISA, quoted *supra*, restrict the disbursal of trust funds. Section 403(c)(1) is a portion of the statute requiring employee benefit plan assets to be held in trust; Section 404(a)(1) is a portion of the statute describing a fiduciary's obligations regarding the disposition of trust fund assets.

The obvious purpose of these provisions is to keep assets of an employee benefit plan from being disbursed to third parties except in limited and carefully controlled circumstances, thereby eliminating the possibility that such assets will be diverted from their intended use. Although ERISA permits benefit plan assets to be paid to persons other than

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ever, the court's holding was explicitly premised on a recognition of the state's critical interest in regulating the sensitive area of family law:

> "Both Congress and the courts recognize that the whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States." *Buechold v. Ortiz,* 401 F.2d 371, 372 (9th Cir. 1968), quoting *Ohio ex rel. Popovici v. Agler,* 280 U.S. 379, 383, 50 S.Ct. 154, 74 L.Ed. 489 (1930). Congress does not infringe *sub silentio* the power to make rules to establish, protect, and strengthen family life [which] is committed by the Constitution of the United States to the legislature of [each state]. *Labine v. Vincent,* 401 U.S. 532, 538, 91 S.Ct. 1017, 1021, 28 L.Ed.2d 288 (1971)."

trust beneficiaries in certain clearly defined instances, it contains no authorization permitting the Trustees to respond to levies and garnishments issued by local or state agencies.[15]

Sound reasons exist for the application of the preemption doctrine in cases such as the present one.[16] Consider the following points:

1. The whole purpose of a "spendthrift" trust such as the Construction Laborers Vacation Trust for Southern California is to create a pool of savings for each individual, to which he will only have access at a specified time. Thus,

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[15]The Board argues that nothing in ERISA explicitly forbids a state from applying sequestration remedies against an ERISA-regulation trust fund. This argument misses the point. As this Court held in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895 (1981), the states are not permitted to apply laws to such trusts which would narrow their federally sanctioned operations. The CLVT Trust Agreement provides that the CLVT's assets shall not be disbursed except to beneficiaries in a specifically prescribed fashion. This is consistent with the command of ERISA that the assets of such a trust "shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. Section 1103(c)(1). By attempting to apply a state law which would, in effect, mandate an exception to the provisions of the Trust Agreement and the command of ERISA, the state has encroached upon the operation of the CLVT in precisely the way this Court found to be forbidden in *Alessi*.

The Second Circuit Court of Appeals has analyzed *Alessi* as holding, inter alia, that "a state statute that eliminates from ERISA-covered employee benefit plans features that are permitted by federal law is preempted." *Delta Airlines, Inc. v. Kramarsky*, 666 F.2d 21, 25 (2nd Cir. 1982), *probable jurisdiction noted* ... U.S. ..., 102 S.Ct. 1968 (1982). The present case fits within the language quoted from *Kramarsky*. Here, the application of the challenged California statute would effectively eliminate a feature of the CLVT which ERISA permits: exemption of the assets of the trust fund from garnishment by creditors of beneficiaries, until the funds are distributed to the beneficiaries.

[16]The Board also argues that the CLVT is not entitled to claim the protection of the preemptive provisions of ERISA, because ERISA regulates pension plans more comprehensively than other types of employee benefit trusts. This argument overlooks the fact that each of the statutory provisions upon which the CLVT relies fall within the provisions of ERISA relating to *all* employee benefit plans. See ERISA, Section 514, 29 U.S.C. Section 1144; ERISA, Section 403(c)(1), 29 U.S.C. Section 1103(c)(1).

the Trust Agreement specifically precludes the hypothecation of trust fund assets (see Statement of Facts, *supra*). If creditors of beneficiaries of the Trust, including the Board, can reach Trust assets through garnishment, the entire purpose of the Trust will be frustrated.

2. If such creditors know that they can reach Trust assets to satisfy their claims, the beneficiaries of the Trust will be able to do indirectly what they cannot do directly, *i.e.*, use Trust assets to satisfy debts and divert portions of their regular (non-Trust) income to other purposes. Beneficiaries who wish to obtain credit may over-extend themselves financially by telling finance companies, car dealers, and other parties that their Trust benefits are a "backup" to their regular income.

3. The administrative expense of having to respond to garnishment notices and claims of judgment creditors on a continuous basis will significantly enlarge the administrative expense of operating the Trust. This will shrink the amount of assets available for the beneficiaries.

4. Only workmen who are actually employed under the terms of a collective bargaining agreement have contributions made to the Trust for their benefit. These workmen are receiving wages, which are subject to garnishment in any event. There is no practical reason why the state cannot proceed, as it usually does, to attempt to garnish wages, rather than attempt to reach assets of the Trust to which the employee is not yet entitled.

5. When the employee *does* receive his payment from the Trust (which occurs on an annual basis), the state can use the remedies at its disposal to levy on the funds in the employee's hands. This relieves the Trust of the administrative burden of responding to large numbers of Notices to Withhold and other types of garnishments and levies, and places the burden of dealing with such matters where it belongs, *i.e.*, on the employee, his employer, and his creditors.

A second reason for finding the application of state sequestration laws preempted appears in this Court's opinion in *Alessi v. Raybestos-Manhattan, Inc., supra.* Vacation trusts, like the pension plans considered in *Alessi*, are creatures of collective bargaining, which have long enjoyed sanction under federal law. *See* Section 302(c)(6), 29 U.S.C. Section 186(c)(6). Such trusts, which "emerge from collective bargaining" call forth "the additional federal interest in precluding state interference with labor-management negotiations . . ." and "as a subject of collective bargaining, [their] terms themselves become expressions of federal law, requiring preemption of intrusive state law." *Alessi, supra*, 101 S.Ct. at 1907.

This Court has repeatedly expressed its concern that state laws not be permitted to interfere in areas of paramount federal cocern, even if they do not directly conflict with federal statutory provisions; see, *e.g., Teamsters v. Oliver*, 358 U.S. 283, 296, 79 S.Ct. 297, 304 (1959); *Amalgamated Assn. of Street, Electric R. and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909 (1971); *San Diego Building Trades Council v. Garmon*, 359 U.S. 326, 79 S.Ct. 773 (1959). After the passage of ERISA, there can be no serious question that the regulation of employee benefit plans is such an area of paramount federal concern.

5. Deference Should Be Accorded to the Determination of the Department of Labor That ERISA Preempts State Garnishments.

As previously noted, the Department of Labor has issued an Advisory Opinion, holding that the preemption provisions of ERISA preclude the State of California and its instrumentalities from garnishing or levying upon assets held by the CLVT.

With the exception of tax matters and certain other specialized areas which are reserved to other departments, the Secretary of Labor is given general authority to issue regulations, investigate claims and initiate litigation to enforce

the provisions of ERISA; *see* 29 U.S.C. Sections 1132(a), 1132(h), 1132(i), 1132(j), 1133, 1134(a), and 1135.

Though the Advisory Opinion of the Department of Labor is admittedly not a "legislative regulation," it is an interpretative determination, entitled to the measure of deference accorded such rulings. *Cf. Buczynski v. General Motors Corporation*, 616 F.2d 1238, 1242, *aff'd. sub nom. Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 1903, n. 13 (1981). The Ninth Circuit's ruling is consistent with the Advisory Opinion of the Department of Labor, and with the language of ERISA's preemption provisions.

C. The Court Should Refuse Consideration of Appellant's Constitutional Claim.

The Board urges, as a ground of appeal, that if ERISA preempts state garnishment statutes, such preemption violates the Tenth Amendment to the U.S. Constitution by interfering with the sovereign power of the State of California to assess and uniformly collect taxes.

This issue was not raised in the U.S. District Court, or in the U.S. Court of Appeals. The undisputed facts which constitute the record below do not include any factual stipulations relating to the alleged "interference" with California's power to assess and collect taxes. Full factual development is a prerequisite before constitutional issues may properly be considered.[17] *See e.g., Alma Motor Co. v. Timkin-Detroit Axle Co.*, 329 U.S. 129, 67 S.Ct. 231 (1947).

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[17]The absence of full factual development and the potentially incomplete record resulting therefrom, is one of the reasons this Court has consistently refused to hear constitutional claims in appeals from State court actions, where those claims have not been initially pursued in the State courts themselves; see *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889, 1893 (1981); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161 (1969).

Certainly, the present record does not support the State's claim that ERISA §514(a) interferes, in any meaningful way, with the assessment and collection of taxes. All the preemption provision does is prevent the State of California from garnishing trust fund assets *before* those assets are distributed to their intended beneficiaries. There is no showing in this record that there is any "essential" interest possessed by the State of California in seizing assets of a trust fund (at considerable expense and disruption to the fund itself) rather than waiting for the assets to be distributed in due course.

The State's Tenth Amendment claim is therefore without merit and should be dismissed.

VII.
CONCLUSION.

The Appeal should be dismissed, or, in the alternative summarily affirmed.

Respectfully submitted,

JAMES P. WATSON,*
GEORGE M. COX,
COX, CASTLE & NICHOLSON,
LAW OFFICES OF LIONEL RICHMAN,
Attorneys for Appellees.

**Counsel of Record for Appellees.*

APPENDIX A.

[Note: All Exhibits to the Complaint have been omitted, except portions of Exhibit A and Exhibit H.]

Superior Court of the State of California
for the County of Los Angeles.

Franchise Tax Board of the State of California,
Plaintiff,

v.

Construction Laborers Vacation Trust for Southern California, Edward Ashton, Al Atwood, Gary Bronneck, John Clarke, R. C. Gallyon, Richard Greenberg, Roger Jaska, William Middleton, Louie Bravo, Benjamin T. James, George Mattocks, William R. McClain, Nick Orsura, Joe Rivera, Ray M. Wilson, James Keyes, as trustees and on behalf of Construction Laborers Vacation Trust for Southern California, DOES I to XXX, inclusive,
Defendants.

No. C326040.

Complaint for Failure to Honor Garnishment
and for Declaratory Relief.

COMES NOW, the People of the State of California, acting by and through the Franchise Tax Board of the State of California (hereinafter referred to as "the Board"), and for a first cause of action alleges as follows:

FIRST CAUSE OF ACTION

1. The Board is the duly constituted agency of the State of California charged with the enforcement of the Personal Income Tax Law of the State of California and is authorized pursuant to California Revenue and Taxation Code section

18817 to issue Notices to Withhold to enforce collection of unpaid tax liabilities.

2. The Board is informed and believes and on that ground alleges that at all times relevant hereto, defendant, Construction Laborers Vacation Trust for Southern California (hereinafter "Defendant Trust Fund"), is and was at all times mentioned herein, an express trust established on April 14, 1966, by written agreement and Declaration of Trust, a copy of which is attached hereto as Exhibit "A" and incorporated herein.

3. Plaintiff is informed and believes and on that ground alleges that defendant Trust Fund's existence has been and now is dependent upon the said Agreement and Declaration of Trust and that its principal place of business is in the County of Los Angeles, State of California.

4. The Board is informed and believes and on that ground alleges that at all times relevant hereto, defendants Edward Ashton, Al Atwood, Gary Bronneck, John Clarke, R. C. Gallyon, Richard Greenberg, Roger Jaska, William Middleton, Louie Bravo, Benjamin T. James, George Mattocks, William R. McClain, Nick Orsura, Joe Rivera, Ray M. Wilson and James Keyes, have been duly appointed and acting trustees of the aforesaid Construction Laborers Vacation Trust for Southern California.

5. That the true names of defendants Doe I to Doe XXX inclusive are unknown to plaintiff and plaintiff will ask leave of this court to amend this complaint when their true names and capacities have been ascertained.

6. Jesse Murphy (hereinafter "Murphy"), while a resident of the State of California during the tax year ending December 1976, incurred personal income tax liability to the State of California under the Personal Income Tax Law

of the State of California and the following amounts remain due, owing and unpaid:

Year	Tax	Interest	Penalties	Total
December 1976	$37.00	$11.70	-0-	$48.70

Further interest accrues on the total amount of tax and interest bearing penalties from May 31, 1980 at $0.012 per day. A copy of the Certificate of Delinquency setting forth the above amount of indebtedness is attached hereto as Exhibit "B" and is incorporated herein by this reference as if set forth in full.

7. On or about September 20, 1978, the Board issued a Notice to Withhold to defendants pursuant to California Revenue and Taxation Code section 18817. Said Notice to Withhold enumerated the tax indebtedness of Murphy as described in paragraph 6 herein and directed that pursuant to California Revenue and Taxation Code section 18817, defendants withhold and transmit to the Board any credits or other personal property or other things of value in defendants' possession or under the its control belonging to said tax debtor Murphy.

8. On or about March 14, 1979, defendants informed the Board that they would not disburse the funds levied upon to either Murphy or to the Board pending the receipt of an opinion letter from the Administrator, Pension and Welfare Benefit Programs, United States Department of Labor as to whether defendants are permitted to honor said liens under the provisions of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"). A copy of said letter is attached hereto as Exhibit "C" and is incorporated herein by reference as if set forth in full.

9. Eriberto G. Salcedo (hereinafter "Salcedo"), while a resident of the State of California during the tax years ending December 1975 and December 1976, incurred per-

sonal income tax liability to the State of California under the Personal Income Tax Law of the State of California and the following amounts remain due, owing and unpaid.

Year	Tax	Interest	Penalties	Payments	Total
December 1975	$232.00	$67.38	$58.00	$189.00	$168.38
December 1976	30.00	8.57	0.00	0.00	38.57

Further interest accrues on the total amount of tax and interest bearing penalties from May 31, 1980 at $0.043 per day. A copy of the Certificate of Delinquency setting forth the above amount of indebtedness is attached hereto as Exhibit "D" and is incorporated herein by this reference as if set forth in full.

10. On or about September 20, 1977 and/or April 20, 1978, the Board issued a Notice to Withhold to defendants pursuant to California Revenue and Taxation Code section 18817. Said Notice to Withhold enumerated the tax indebtedness of Salcedo as described in paragraph 9 herein and directed that pursuant to California Revenue and Taxation Code section 18817 defendants withhold and transmit to the Board any credits or other personal property or other things of value in defendant's possession or under their its [sic] control belonging to said tax debtor Salcedo.

11. On or about January 18, 1978, defendants informed the Board that they would not disburse the funds levied upon to either Salcedo or to the Board pending the receipt of an opinion letter from the Administrator, Pension and Welfare Benefit Programs, United States Department of Labor as to whether defendants are permitted to honor said liens under the provisions of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"). A copy of said letter is attached hereto as Exhibit "E" and is incorporated herein by reference as if set forth in full.

12. Vincent Zarate (hereinafter "Zarate"), while a resident of the State of California during the tax year ending December 1977, incurred personal income tax liability to the State of California under the Personal Income Tax Law of the State of California and the following amounts remain due, owing and unpaid.

Year	Tax	Interest	Penalties	Payments	Total
December 1977	$586.00	$24.59	$28.32	$514.00	$124.00

Additional penalty on the total unpaid tax accrues from May 31, 1980, at $0.012 per day until April 15, 1981. Additional interest on the total unpaid tax and interest bearing penalties accrues from May 31, 1980, at $0.028 per day. A copy of the Certificate of Delinquency setting forth the above amount of indebtedness is attached hereto as Exhibit "F" and is incorporated herein by this reference as if set forth in full.

13. On or about September 20, 1978, the Board issued a Notice to Withhold to defendants pursuant to California Revenue and Taxation Code section 18817. Said Notice to Withhold enumerated the tax indebtedness of Zarate as described in paragraph 12 herein and directed that pursuant to California Revenue and Taxation Code section 18817 defendants withhold and transmit to the Board any credits or other personal property or other things of value in defendants' possession or under their its [sic] control belonging to said tax debtor Zarate.

14. On or about March 14, 1979, defendants informed the Board that they would not disburse the funds levied upon to either Zarate or to the Board pending the receipt of an opinion letter from the Administrator, Pension and Welfare Benefit Programs, United States Department of Labor as to whether defendants are permitted to honor said liens under the provisions of the Employee Retirement In-

come Security Act of 1974 (hereinafter "ERISA"). A copy of said letter is attached hereto as Exhibit "G" and is incorporated herein by reference as if set forth in full.

15. On or about January 7, 1980, defendants notified the Board that the defendants would not honor the levies made upon them by the State of California pursuant to an Advisory Opinion from the United States Department of Labor. A copy of said notification and its exhibit, the Advisory Opinion are attached hereto as Exhibit "H" and are incorporated herein by reference as if set forth in full.

16. The Board is informed and believes and on that ground alleges that at the time of the service of the Notice to Withhold referred to in paragraphs 7, 10, and 13 of this complaint, there existed in the said defendant Trust Fund monetary accruals in favor of Murphy, Salcedo and Zarate, which said defendants wrongfully failed and refused to pay over to the Board pursuant to said Notice to Withhold. The Board does not know the exact amount of the said accruals at this time and prays leave to amend this complaint to allege said amount when it has been ascertained through discovery.

17. By reason of the aforesaid failure and refusal of said defendants, the Board has been damaged in a sum equal to the then existing accruals in favor of Murphy, Salcedo and Zarate not to exceed $380.56 plus interest from June 1, 1980.

SECOND CAUSE OF ACTION.

18. The Board hereby incorporates by reference all the allegations contained in paragraphs 1 through 17 of the First Cause of action.

19. There was at the time of the levies alleged above and continues to be an actual controversy between the parties concerning their respective legal rights and duties. The

Board contends that defendants are obligated and required by law to pay over to the Board all amounts held in the Construction Laborers Vacation Trust for Southern California in favor of the Board's delinquent taxpayers. On the other hand, defendants contend that section 514 of ERISA preempts state law and that the trustees lack the power to honor the levies made upon them by the State of California.

20. The above described dispute between the parties has continued from the dates of the service of the Notice of [sic] Withhold alleged above and will continue into future years in that the Board will continue to attempt levy and garnishment of the defendant Trust Fund for the collection of the tax obligations of defendant's tax debtor beneficiaries and defendants will continue to refuse to honor the Board's levies in this regard. Accordingly, a declaration by this court of the parties' respective rights is required to fully and finally resolve this controversy.

WHEREFORE, plaintiff prays judgment as follows:

1. That defendants wrongfully failed and refused to honor the levies of the Board upon defendant Trust Fund in collection of the tax indebtedness of beneficiaries Murphy, Salcedo and Zarate;

2. That the Board has been damaged as a direct and proximate result of defendants' wrongful failure and refusal to honor the Board's levy and garnishment and that the amount of said damage is equal to the accruals existing in favor of Murphy, Salcedo and Zarate, at the time of said levy plus interest;

3. That the Board be awarded judgment against defendants in a sum equal to the amount of said accruals as hereafter determined to exist through discovery;

4. That the court declare defendants legally obligated to honor all future levies by the Board upon defendant Trust Fund in collection of tax delinquencies of the beneficiaries of defendant Trust Fund;

5. That plaintiff be awarded costs of suit herein and such other relief as this court deem just and proper.

GEORGE DEUKMEJIAN,
Attorney General,
EDMOND B. MAMER,
PATTI S. KITCHING,
Deputy Attorneys General,
By /s/ PATTI S. KITCHING,
Attorneys for Plaintiff.

EXHIBIT "A".

AGREEMENT AND DECLARATION OF TRUST ESTABLISHING THE CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA.

ARTICLE 1 — PARTIES TO AGREEMENT

This Agreement and Declaration of Trust is made and entered into in the County of Los Angeles, State of California, upon the considerations hereinafter set forth, by and between the following parties:

1.01 Associations:

(a) Southern California Chapter of the Associated General Contractors of America.

(b) Home Builders Association of Los Angeles, Orange and Ventura Counties, successor to Home Builders Institute, Inc.

(c) Engineering and Grading Contractors' Association of California, Inc.

(d) Building Contractors' Association of California, Inc.

1.02 Union:

Southern California District Council of Laborers for and on behalf of the District Council and its affiliated Local Unions of the International Hod Carriers, Building and Common Laborers' Union of America, A.F.L.-C.I.O. Subsequent to the execution of the Collective Bargaining Agreement, described in Section 3.01(a), International Hod Carriers, Building and Common Laborers' Union of America changed its name to "Laborers' International Union of North America." Any reference herein to "International

Hod Carriers, Building and Common Laborers' Union of America" shall be deemed to likewise refer to "Laborers' International Union of North America."

ARTICLE II — REASONS FOR AGREEMENT

2.01 The Union and the Associations have entered into collective bargaining agreements which provide, among other things, for the establishment of a fund for the payment of paid vacations.

2.02 The Union and the Associations desire to establish a Vacation Fund as a Trust Fund for receiving contributions and to provide vacation benefits for eligible employees.

2.03 The Union and the Associations desire to set forth the terms and conditions under which the said Fund is to be established and administered; and to set forth the power and duties of the Trustees and nature of the benefits to be provided: and to set forth their agreement respecting such other matters as are pertinent to the Vacation Fund.

* * *

ARTICLE IV — CREATION OF TRUST

4.01 There is hereby created the Construction Laborers Vacation Trust for Southern California, which shall consist of all contributions required by the Collective Bargaining Agreements to be made for the establishment and maintenance of the Plan, and all interest, income and other returns thereon of any kind whatsoever, and any other property received or held by reason of or pursuant to this Trust.

. . .

4.03 No employee or beneficiary shall be entitled to receive any part of the contributions made or required tc be made to the Fund except as provided by the Plan.

4.04 The Board of Trustees shall have the continuing supervision, control and direction of the Fund for the uses,

purposes and duties set forth in this Trust Agreement and be vested with all right, title and interest to it except as the right to certain monies may vest in employees, as more particularly hereinafter set forth. The fund shall be administered by the Board of Trustees for the exclusive benefit of employees and the beneficiaries of such employees. Notwithstanding anything to the contrary contained in this Trust Agreement or in the Plan, any modification, amendment, extension or renewal hereof or of the Plan, no portion of the Fund shall at any time revert to, or be recoverable by, any of the Associations, any individual employer, the Union, or any Local Union, or be used for, or diverted to, purposes other than for the exclusive benefit of employees or their beneficiaries under the Plan, and the payment of the administrative expenses of the Fund and the Plan, or refund of erroneous payments.

4.05 Neither the Associations, any individual employer, the Union, any Local Union, any employee, nor beneficiary under the Plan nor any other person shall have any right, title or interest in or to the Fund other than as specifically provided in this Trust Agreement. Neither the Fund nor any contributions to the Fund shall be in any manner liable for or subject to the debts, contracts or liabilities of any of the Associations, any individual employer, the Union, any Local Union, or any employee or beneficiary.

4.06 Each employee or beneficiary under the Plan is hereby restrained from selling, transferring, anticipating, assigning, hypothecating or otherwise disposing of his benefits hereunder or any other right or interest under the Plan, and the Board of Trustees shall not recognize, or be required to recognize, any such sale, transfer, anticipation, assignment, hypothecation or other disposition. Any such benefit, right or interest shall not be subject in any manner to vol-

untary transfer or transfer by operation of law or otherwise, and shall be exempt from the claims of creditors or other claimants and from all orders, decrees, garnishments, executions or other legal or equitable process or proceedings to the fullest extent permissible by law.

4.07 Neither the Association nor any officer, agent, employee or committee member of the Association shall be liable to make contributions to the Fund or be under any other liability to the Fund or with respect to the Plan, except to the extent that he or it may be an individual employer required to make contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he may incur liability as a Trustee as hereinafter provided. The liability of any individual employer to the Fund, or with respect to the Plan, shall be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the contributions due from other individual employers with respect to the operations of such individual employers. The individual employers shall not be required to make any further payments or contributions to the cost of operation of the Fund or of the Plan, except as may be hereafter provided in the Collective Bargaining Agreements.

. . .

ARTICLE V — TRUSTEES

5.01 The Fund and Plan shall be administered by a Board of Trustees consisting of sixteen Trustees, eight of whom shall be designated "Employer Trustees" and eight of whom shall be designated "Union Trustees."

5.02 The Employer Trustees shall be appointed in writing by the Associations, which Associations are irrevocably designated by each individual employer as his or its

attorneys-in-fact for the purpose of appointing and removing Trustees and successor Trustees.

5.03 The Union Trustees shall be appointed by majority vote of those delegates to the District Council who represent Local Unions which are affiliated with the District Council and which have collective bargaining agreements with individual employers, which agreements provide for the making of employer contributions to this Fund; . . .

* * *

5.20 Functions, Power and Duties of Trustees:

(a) The Associations, individual employers, and the Union and Local Unions irrevocably grant Power of Attorney to the Trustees now in office or subsequently appointed in accordance with the provisions of this Agreement and Declaration of Trust to administer said Fund and, as the representative of such parties, to exercise rights granted to the Trustees under Section 9.01.

(b) The Board of Trustees shall have the power to administer the Fund and to administer and maintain the Plan in effect, having and performing all powers and duties reasonably necessary to maintain and operate the Plan in such a way as to accomplish its objectives. The detailed basis on which benefits are to be paid are hereinafter set forth in ARTICLE IX hereof. The Board of Trustees may at any time, and from time to time, amend or modify such Plan. In no event shall any amendment or modification of the Plan cause or result in any portion of the Fund reverting to, or being recoverable by, any of the Associations, any individual employer, the Union, or any Local Union, or cause or result in the diversion of any portion of the Fund to any purpose other than the exclusive benefit of employees or their beneficiaries under the Plan and the payment of the

administrative expenses of the Fund and the Plan, or refund or erroneous payments.

* * *

ARTICLE VI — CONTRIBUTIONS

6.01 Contributions shall be paid into the Fund in such manner and with such reports as the Board of Trustees may prescribe.

* * *

ARTICLE VII — GENERAL PROVISIONS

* * *

7.07 Subject to the provisions of the Collective Bargaining Agreements, the rights and duties of all parties, including the Associations, the individual employers, the Union, the Local Unions, the employees and their beneficiaries, and the Trustees, shall be governed by the provisions of this Trust Agreement and the Plan and any insurance policies or contracts procured or executed pursuant to this Trust Agreement.

7.08 No employee, or other beneficiary, shall have any right or claim to benefits under the Plan, other than as specified in such Plan. Any dispute as to eligibility, type, amount or duration of benefit shall be resolved by the Board of Trustees under and pursuant to the Plan, and its decision of the dispute shall be final and binding upon all parties thereto. No action may be brought for benefits under the Plan or to enforce any right thereunder until after the claim therefor has been submitted to, and determined by the Board, and thereafter the only action that may be brought is one to enforce the decision of the Board. Neither the Associations, any individual employer, the Union, any Local Union, nor any of the Trustees shall be liable for the

failure or omission for any reason to pay any benefits under the Plan.

* * *

ARTICLE IX — THE PLAN

9.01 On and after July 1, 1966, employees entitled to vacation benefits shall have the right to be paid the sums credited to their respective vacation amounts, subject to the terms and conditions as may be provided by regulation or resolution of the Board of Trustees pursuant to the authority given by this Agreement.

9.02 On or about July 1, 1966, an employee entitled to benefits under this Trust Agreement shall have the right to receive the monies credited to his vacation account by reason of work performed by him in the period June 1, 1965 through March 31, 1966. . . .

9.04 Not earlier than January 1 nor later than March 31 of any year, an employee shall make application to the Trust for his normal distribution of vacation benefits, such application to be made in such manner and on such form as the Trustees shall from time to time prescribe. . . .

9.07 Contributions to the Fund and any liquidated damages payable in connection therewith, shall be deemed to be, and shall be, a part of the wages due to the employees with respect to whose work such payments are made. No individual employer shall have any right, title or interest in such contributions, or any part thereof, and no part thereof shall ever revert to any such individual employer. Insofar as consistent with the other provisions of this Agreement, contributions shall be treated and reported as a part of the compensation earned by the employee at the time the work to which the contributions pertain is performed, subject to the terms of this Agreement, and shall be deemed to be, and shall be treated as, subject to withholding tax and social

security and unemployment taxes as a part of the total compensation payable at the end of the individual employer's payroll period during which such work is performed or paid for, but the full per hour contribution shall be transmitted to the Fund. Such contributions shall not be a part of the hourly wage rates for the purpose of computing overtime, or reporting time or for any other purpose of the Collective Bargaining Agreement, or part of the "regular rate" or "basic hourly rate" for the purpose of the Federal Fair Labor Standards Act or the Walsh-Healy Act or any other law, ordinance or regulation, except that if, consistent with the foregoing, such contributions can be considered and treated as a part of the wages prevailing in the area for the purpose of the Federal Davis-Bacon Act and similar federal, state or local laws, ordinances or regulations, they shall be so considered and treated. If any administrative or judicial ruling holds that any provision of this Agreement prevents or defeats any of the objectives stated in this section, the parties will forthwith enter into negotiations with regard to the amendment of this Agreement in such respects as may be necessary to accomplish the objectives so stated, consistent with the other objectives and purposes of this Agreement, and any such amendment shall be effective, insofar as practicable, as of the date of this Agreement.

9.08. It is the intent and purpose of the Plan, and of this Agreement, and a material part of the consideration for the making of contributions to the Fund by individual employees, that the money in each vacation account shall be received by the employee entitled thereto personally. Accordingly, no payments due the Fund and no monies in vacation accounts established pursuant to the Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge by any employee or any other persons and any such anticipation,

alienation, sale, transfer, assignment, pledge, encumbrance or charge shall be void and ineffective. The money credited to a vacation account shall be subject to withdrawal and distribution only at the times, in the manner and for the purposes specified in this Agreement.

* * *

Executed at Los Angeles County, California, as of the 14th day of April, 1966.

EACH OF THOSE SIGNING AS "ASSOCIATION" BELOW EXPRESSLY WARRANTS THAT HE IS AUTHORIZED TO EXECUTE THIS AGREEMENT ON BEHALF OF THE ASSOCIATION LISTED OVER HIS SIGNATURE AND WARRANTS THAT ALL OF THE ELIGIBLE MEMBERS OF SAID "ASSOCIATION" ARE PARTIES TO AND BOUND BY THE TERMS AND PROVISIONS OF THIS AGREEMENT FOR ITS DURATION; AND FURTHER WARRANTS THAT ANY INDIVIDUAL EMPLOYER WHO SHALL BECOME AN ELIGIBLE MEMBER OF SAID "ASSOCIATION" ON OR AFTER THIS DATE AND DURING THE TERM OF THIS AGREEMENT SHALL AUTOMATICALLY BECOME SUBJECT TO AND BOUND BY THIS AGREEMENT DURING ITS TERM.

Associations

SOUTHERN CALIFORNIA CHAPTER OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

/s/ By W.D. Shaw

BUILDING CONTRACTORS' ASSOCIATION OF CALIFORNIA, INC.

/s/ By Edward M. Sills

ENGINEERING AND GRADING CONTRACTORS' ASSOCIATION, INC.

/s/ By C.W. Burke

HOME BUILDERS ASSOCIATION OF LOS ANGELES, ORANGE AND VENTURA COUNTIES, (successor to HOME BUILDERS INSTITUTE, INC.)

/s/ By R.A. Alsweet

Union

SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS, INDIVIDUALLY AND FOR AND ON BEHALF OF ITS AFFILIATED LOCAL UNIONS IN SOUTHERN CALIFORNIA, WHICH HAVE JURISDICTION OVER THE WORK AS SET FORTH IN THAT CERTAIN DOCUMENT KNOWN AS "MASTER LABOR AGREEMENT" BETWEEN SOUTHERN CALIFORNIA GENERAL CONTRACTORS AND SOUTHERN CALIFORNIA DISTRICT COUNCIL OF LABORERS," DATED JUNE 1, 1965.

/s/ By James V. Flores

/s/ By Ray Waters

/s/ By James V. Brimhall

The undersigned, named as Original Trustees in the foregoing Agreement and Declaration of Trust, do acknowledge

they have read the foregoing instrument, do understand the contents thereof, and do hereby agree to act as Trustees thereunder, to comply with all of its terms and provisions, and to hold the Fund created by said Agreement in trust for the uses and purposes set forth in the Agreement.

/s/ James V. Flores

/s/ James H. Crowell

/s/ Ray Waters

/s/ Ray Mendoza

/s/ Joseph Y. Murdock

/s/ Ray M. Wilson

/s/ Don E. Graves

/s/ Nick Orsura

/s/ S.J. Hibbler

/s/ Herb W. Smith

/s/ R.C. Gallyon

/s/ Peter E. Johnson

/s/ Reed Sprinkel

/s/ E.M. Barker

/s/ R.A. Alsweet

/s/ Syd Carnine

DATED: April 14, 1966.

EXHIBIT "H".

LAW OFFICES
RICHMAN & GARRETT
A Professional Corporation

January 7, 1980

Mr. John D. Dykeman
Special Procedures Section
Franchise Tax Board
Sacramento, California 95867

Re: Construction Laborers Vacation Trust for Southern California
Your File No. 340:97:JDD:dmf

Dear Mr. Dykeman:

We have now finally received the opinion letter from the United States Department of Labor relative to the liens which you have served upon us for personal income tax, as well as other liens which have been served upon us by the Franchise Tax Board. We are enclosing a copy of that opinion letter.

The conclusion which is set forth in the first full paragraph of the fourth page is that Section 514 of ERISA pre-empts State law and that the Trustees lack the power to honor the levies made upon us by the State of California.

Co-counsel propose to recommend to the Board of Trustees at their next meeting that the monies which have been withheld pending the receipt of this opinion letter be distributed to the Plan participants.

Since the next meeting has not yet been scheduled, we would assume that it would not be set before the middle of February, 1980, in the event you desire to institute legal action to test this opinion.

Very truly yours,
RICHMAN & GARRETT

LR/hal Lionel Richman

cc(w/enc.): George M Cox, Esq.
Mr. Edward Ashton
Mr. Ray M. Wilson
Construction Laborers Vacation Trust
for Southern California

U.S. Department of Labor

Dec. 28 1979

Mr. Lionel Richman
Richman & Garrett
1336 Wilshire Boulevard
Los Angeles, California 90017

Dear Mr. Richman:

This is in response to your request for an opinion on behalf of the Construction Laborers Vacation Trust for Southern California (Plan) regarding the Employee Retirement Income Security Act of 1974 (ERISA). Specifically, you ask whether the trustees of the Plan may honor (1) the process of any state judicial or administrative agency seeking to levy upon benefits due a beneficiary under the Plan, and (2) process from the U.S. Internal Revenue Service (IRS) directed to monies due a beneficiary under the Plan.

You advise that the Plan is created by a written agreement and declaration of trust pursuant to section 302 of the Labor Management Relations Act, 1947, as amended (LMRA). Under a collective bargaining agreement, employers are obligated to pay to the Plan a fixed sum per hour for each hour worked on behalf of each employee covered by the collective bargaining agreement. The contributions are added to the employee's pay for the purpose of calculating appropriate taxes and then are deducted and transmitted to the Plan. The Plan holds the funds for annual distribution. The State of California, acting through the State Baord of Equalization, has served a "Notice to Withhold" for sales and use tax under state law, upon the Plan, seeking to seize benefits due a particular beneficiary under the Plan. Prior to the effective date of ERISA, the Franchise Tax Board of the State of California made similar levies for state in-

come taxes and other state agencies made similar levies for unpaid unemployment insurance contributions due from beneficiaries who were formerly employers. From time to time, the U.S. Internal Revenue Service (IRS) also has made such levies.

You further advise that section 9.08 of the trust instrument reads as follows:

> "It is the intent and purpose of the Plan, and of this Agreement, and a material part of the consideration for the making of contributions to the Fund by individual employers, that the money in each vacation account shall be received by the employee entitled thereto personally. Accordingly, no payments due the Fund and no monies in vacation accounts established pursuant to the Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge by any employee or other persons and any such anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge shall be void and ineffective. The money credited to a vacation account shall be subject to withdrawal and distributed only at the times, in the manner and for the purposes specified in this Agreement."

We assume that in using the word "beneficiary" in your letter you mean a "participant" or "beneficiary" as these terms are defined by ERISA sections 3(7) and (8).

Section 403(c)(1) of ERISA provides, as here relevant, that "the assets of a plan . . . shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." Similarly, section 404(a)(1) of ERISA provides, in part, that:

> . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan; . . . and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title.

Section 514 of ERISA provides, in part, as follows:

(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect January 1, 1975. . . .

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

(d) Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law.

Section 514(a) established a broad preemption of all state laws insofar as they may relate to any employee benefit plan

covered by title I of ERISA. The reasons for broad preemption of state laws under ERISA were succinctly stated by Senator Javits, a major sponsor and floor manager of the bill, during its final consideration as follows:

> Both the House and Senate bills, provided for preemption of State Law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension plans not clearly connected to the Federal regulatory scheme.
>
> Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefits programs. 120 Cong. Rec. S15751 (daily ed. Aug. 22, 1974).

Based on the above, it is the position of the Department of Labor that the process of any state judicial or administrative agency seeking to levy for unpaid taxes or unpaid unemployment insurance contributions upon benefits due a participant or beneficiary under the Plan is pre-empted under ERISA section 514.

With regard to process from the IRS, section 514(d) of ERISA provides that no provision should be construed in such a way as to affect any other Federal law or any rule or regulation issued under the law. Section 6334(c) of the Internal Revenue Code of 1954, which was in effect before

the enactment of ERISA, provides that notwithstanding any other law of the United States, no property or right to property is exempt from a Federal tax levy other than certain property which is specifically made exempt under section 6334(a). The specific exemptions set forth in section 6334(a) do not include the type of benefits with which you are concerned. Therefore, it is the view of the Department that the trustees of the Plan may honor such IRS tax levies and, pursuant to ERISA section 514(d), not be in violation of ERISA sections 403(c)(1) and 404(a)(1).

It should be noted that no opinion is expressed herein as to any application of section 302 of the LMRA.

This letter constitutes an advisory opinion under ERISA Procedure 76-1 (copy enclosed). Accordingly, this letter is issued subject to the provisions of the procedure, including section 10 relating to the effect of advisory opinions.

Sincerely,

Ian D. Lanoff
Administrator
of Pension and Welfare
Benefit Programs

Enclosure

cc: Mr. George M. Cox
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Los Angeles, California 90067

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No. 82-695

IN THE

Supreme Court of the United States

October Term, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLANT, FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA.

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Questions Presented.

1. Does this Court have jurisdiction over this appeal?

2. Did the United States District Court have subject matter jurisdiction over the Complaint for Failure to Honor Garnishment and for Declaratory Relief which was originally filed in State court by the Franchise Tax Board (the Board) and removed by the Construction Laborers Vacation Trust For Southern California et al., (CLVT) to District Court where the Board's causes of action were based solely on State law and any federal question was raised only as a defense?

3. Is California prohibited by the doctrine of preemption from collecting delinquent personal income taxes from a vacation fund regulated by some of the provisions of the Employment Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq. (commonly known as ERISA), notwithstanding the fact that

   a. The California statute which authorizes said collection (California Revenue and Taxation Code section 18817) does not "relate" to the vacation fund in that it does not regulate the terms or conditions of the fund.
   b. Congress did not specifically provide that ERISA was intended to preempt State levy statutes such as the California statute?
   c. The California statute neither conflicts with any specific provision of ERISA nor interferes with the Congressionally stated purpose of ERISA;

4. Should the provisions of ERISA be interpreted in such a way as to not interfere with the sovereign power of the State of California to assess and uniformly collect its taxes if this interpretation would avoid the question as to whether ERISA is unconstitutional as a violation of the Tenth Amendment?

Parties to This Action.

The parties to this action are:

1. The Franchise Tax Board of the State of California.
2. The Construction Laborers Vacation Trust for Southern California.
3. Edward Ashton.
4. Al Atwood.
5. Gary Bronneck.
6. John R. Clarke.
7. R.C. Gallyon.
8. Richard Greenberg.
9. Roger Jaska.
10. William Middleton.
11. Tony Hoffman.
12. William R. McClain.
13. Armando Lopez.
14. Joe Rivera.
15. Ray M. Wilson.
16. James Keyes.
17. Boyd McDougal.
18. Carlos Cerna.

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No. 82-695

IN THE

Supreme Court of the United States

October Term, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,
Appellees.

BRIEF OF APPELLANT, FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA.

OPINIONS BELOW.

The Opinion of the Court of Appeals for the Ninth Circuit, filed on June 22, 1982, is reported at 679 F.2d 1307 and is reproduced at A.1-A.14 of the Board's Jurisdictional Statement.[1] The Order of the Court of Appeals for the Ninth Circuit denying the Board's Petition For Rehearing was filed on July 21, 1982, and is reproduced at A.24. The Judgment of the United States District Court for the Central District of California was filed on December 3, 1980 and is reproduced at A.15-16. The Findings of Fact and Conclusions of Law for the United States District Court for the Central

[1]Citations in the form "A. ...." are to the Appendix to the Jurisdictional Statement filed by the Franchise Tax Board and in the form "J.A. ...." to the Joint Appendix.

District of California were filed on December 3, 1980 and are reproduced at A.17-23.

JURISDICTION.

This suit was originally brought in the Superior Court of the State of California for the County of Los Angeles by the Board. (J.A. 3.)

CLVT removed the case to the United States District Court for the Central District of California. (J.A. 87.) The District Court denied the Board's Motion To Remand. (J.A. 105.)

The District Court granted summary judgment for the Board. (A.15.) CLVT appealed to the Ninth Circuit. The Opinion of the Court of Appeals for the Ninth Circuit reversing the District Court's granting of summary judgment for the Board was filed on June 22, 1982. (A.1-14.) A timely Petition For Rehearing was filed on July 6, 1982. (A.25-36.) The Petition For Rehearing was denied on July 21, 1982. (A.24.)

The Board filed a Notice of Appeal to the Supreme Court of the United States from the Opinion on September 17, 1982, with the clerk, United States Court of Appeals for the Ninth Circuit. (A.37.) This appeal was docketed on October 18, 1982. On December 13, 1982, this Court postponed further consideration of its jurisdiction to the hearing of the case on the merits. (J.A. 106.)

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(2). Such a direct appeal is allowed where a Court of Appeals holds a State statute to be invalid as repugnant to the Constitution, treaties or laws of the United States. Herein the Court of Appeals for the Ninth Circuit held that California Revenue and Taxation Code section 18817 was preempted by ERISA insofar as it allowed the Franchise Tax Board to levy on a welfare

plan (here a vacation fund). (*See Delta Airlines v. Kremarsky* (2d Cir. 1981) 666 F.2d 21, vacating (2d Cir. 1981) 650 F.2d 1287, prob. juris. noted (1982) 102 S.Ct. 1968 and *Alessi v. Raybestos-Manhattan, Inc.* (1981) 451 U.S. 504.)

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

California Revenue and Taxation Code section 18817 provides in pertinent part:

> "The Franchise Tax Board may . . . require any employer, person, . . . having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer . . . to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer . . . and to transmit the amount withheld to the Franchise Tax Board at such times as it may designate."

California Code of Civil Procedure section 1060 provides in pertinent part:

> "Any person . . . who desires a declaration of his rights or duties with respect to another, . . . may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an original action in the superior court. . . ."

29 U.S.C. § 1002 (ERISA § 3) provides in pertinent part:

> "For purposes of this subchapter:
>
> "(1) The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program . . . to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, . . . (A) . . . vacation benefits, . . .
>
> "(2)(A) . . . the terms 'employee pension benefit plan' and 'pension plan' mean any plan, fund, or pro-

gram . . . to the extent that . . . such plan, fund, or program —

(i) provides retirement income to employees . . .

". . .

". . .

"(3) The term 'employee benefit plan' or 'plan' means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan."

29 U.S.C. § 1056(d)(1), ERISA section 206(d)(1) provides as follows:

"Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

29 U.S.C. § 1144, ERISA section 514 provides as follows:

"(a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. . . .

". . .

"For purposes of this section:

". . .

"(2) The term 'State' includes a State, . . . which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter."

(ERISA § 514 was recently amended by P.L. 97-473 which was signed into law January 14, 1983. These amendments made no changes to the above quoted sections of ERISA § 514.)

The following additional constitutional and statutory provisions are reproduced in pertinent part in the appendix to this brief:

United States Constitution, Article VI, cl. 2
United States Constitution, Amendment X
28 U.S.C. § 1254(2)
28 U.S.C. § 1331
28 U.S.C. § 1441
ERISA
29 U.S.C.
Subchapter 1 — Protection of Employee Benefit Rights
Subtitle A — General Provisions
§ 1001 — Congressional findings and declaration of policy
Subtitle B — Regulatory Provisions
Part 1 — Reporting and Disclosure
§ 1021 — Duty of disclosure and reporting
Part 2 — Participation and Vesting
§ 1051 — Coverage
§ 1056(d) — Assignment or Alienation of Plan Benefits
Part 3 — Funding
§ 1081 — Coverage
Part 4 — Fiduciary Responsibility
§ 1103 — Establishment of trust
§ 1104 — Fiduciary duties
Part 5 — Administration and Enforcement
§ 1132 — Civil enforcement
California Revenue and Taxation Code § 18818

STATEMENT OF THE CASE.

The Franchise Tax Board is the agency of the State of California charged with the enforcement of the Personal Income Tax Law of the State of California and is authorized, pursuant to California Revenue and Taxation Code section

18817, to issue Notices to Withhold to enforce collection of unpaid tax liabilities.

ERISA regulates "employee benefit plans," which includes "pension plans" and "welfare plans." The Construction Laborers Vacation Trust For Southern California (CLVT) is a "welfare plan," which was established to provide vacation benefits to its participants. (ERISA sections 3(1), 3(2) and 3(3), 29 U.S.C. §§ 1002(1), 1002(2) and 1002(3).) CLVT will be referred to as a welfare plan or a vacation fund.

CLVT holds vacation funds on behalf of certain participants who are employed in the construction industry. These vacation funds are governed by some of the provisions of ERISA. The Board has attempted to levy on these vacation funds in order to collect the delinquent personal income taxes of certain participants of the funds. The primary issue in this case concerns these vacation funds. The Board has not levied on pension funds. Moreover, the Board is not taxing the vacation fund itself; it is merely levying on this vacation fund as a means of tax collection.

CLVT has refused to honor the Board's levy, basing its refusal on its allegation that California Revenue and Taxation Code section 18817 has been preempted by ERISA.

Pursuant to collective bargaining agreements between the Southern California District Council of Laborers and various employers' associations, the Construction Laborers Vacation Trust for Southern California was established on April 14, 1966. (J.A. 12, 13, 54.) The Agreement And Declaration Of Trust Establishing The Construction Laborers Vacation Trust For Southern California is reproduced at the Joint Appendix pp. 11-56.)

Under the terms of the Agreement and Declaration of Trust, a Vacation Fund was established to receive contri-

butions and to provide vacation benefits for eligible employees. (Trust Agreement, Section 2.02, J.A. 13.)

Contributions to the Vacation Fund are a part of the wages due to the employees covered by the collective bargaining agreement and are subject to withholding tax and social security and unemployment taxes. (Trust Agreement, Section 9.07, J.A. 48.)

Under the collective bargaining agreement, employers are obligated to pay to the Vacation Fund contributions for each hour worked on behalf of each employee whose work is covered by the agreement.

The Trust accumulates the contributions in a "vacation account" for each covered employee. The Trust issues checks annually for the vacation benefits to each covered employee who meets certain requirements set forth in the Trust Agreement. (Trust Agreement, Section 9.02, J.A. 45.)

The amounts credited to an employee's vacation account may not be accumulated from one annual period to another and if an employee fails to apply in a timely manner for such benefits or fails to cash a benefit check by a certain date, he shall be deemed to have contributed such amount to the cost of maintaining the vacation fund and checks already issued to him for such period will be void. (Trust Agreement, Sections 9.03-9.04; J.A. 46.)

The Agreement And Declaration of Trust provides that no payments due the Fund and no monies in vacation accounts established pursuant to the Plan shall be anticipated, alienated, sold, transferred, assigned, pledged, encumbered or charged by any employee or any other persons. (Trust Agreement, Section 9.08, J.A. 49.)

As stated, the Board served Notices to Withhold Personal Income Taxes pursuant to California Revenue and Taxation

Code section 18817 on CLVT in order to collect the unpaid personal income tax liabilities of certain participants from the vacation funds held by CLVT for those participants. Based on an opinion from the Department of Labor, the Trustees refused to honor said Notices to Withhold on the grounds that Revenue and Taxation Code section 18817 was preempted by ERISA, specifically ERISA section 514, 29 U.S.C. § 1144. (J.A. 66.) The Department of Labor opinion indicated that an Internal Revenue Service levy could be honored. (J.A. 72.)

Because CLVT refused to honor the Board's levy, the Board filed an action on June 13, 1980 for failure to honor garnishment and for declaratory relief in the Superior Court of the State of California for the County of Los Angeles. (J.A. 3.) The Board based its causes of action solely on State law. (J.A. 3-9.)

CLVT filed a Petition For Removal which alleged that the federal court had original jurisdiction over this proceeding pursuant to sections 403(c)(1) and 514 of ERISA (29 U.S.C. §§ 1103, 1104, 1144.) (J.A. 87-88.) CLVT alleged that the action was properly removed to federal court pursuant to 28 U.S.C. § 1441. (J.A. 88.) The case was removed to federal court. The Board filed a Motion To Remand pursuant to 28 U.S.C. § 1447(c) on the grounds that the District Court did not have jurisdiction of the subject matter of the action. The Board alleged the suit did not involve a claim or right arising under the Constitution, treaties or laws of the United States and that there was no other basis for the court's jurisdiction since the Board's cause of action arose solely under California law as construed and applied by the courts of the State of California. (Motion to Remand, p. 2.) The United States District Court for the Central District of California denied the Motion To Remand. (J.A. 105.)

CLVT filed a Motion to Dismiss on the ground that Revenue and Taxation Code section 18817 as the Board sought to apply it in this case was preempted by ERISA, specifically ERISA section 514, 29 U.S.C. § 1144. The Board filed its opposition to the Motion to Dismiss and the parties agreed that the Motion to Dismiss and opposition thereto could be treated as cross motions for summary judgment.

The United States District Court made its order granting summary judgment for the Board. On December 3, 1980, Findings of Fact and Conclusions of Law and Judgment were filed. (A.15-23.)

On December 16, 1980, CLVT filed its Notice of Appeal to the Court of Appeals for the Ninth Circuit. The case was argued before a three judge panel of the Court of Appeals. On June 22, 1982, the panel issued an opinion (one judge dissenting) reversing the District Court's granting of summary judgment for the Board. (A.1-14.) A Petition for Rehearing was timely filed. (A.25-36.) The panel issued an order on July 21, 1982 denying the Petition for Rehearing. (A.24.)

Two of the three Justices of the Court of Appeals found that although vacation funds are not specifically protected from creditors' claims under ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) as are pension funds, they are covered by implication, and further that Revenue and Taxation Code section 18817 is preempted by ERISA section 514(a), 29 U.S.C. § 1144(a) as a State law relating to an employee benefit plan insofar that it is used to levy against a vacation fund to satisfy a participant's delinquent taxes. The Court of Appeals relied for its opinion on the case of *Alessi v. Raybestos-Manhattan, Inc.* (1981) 451 U.S. 504 decided by this Court. The dissenting Justice found that the District

Court did not have jurisdiction of the action and even if it did possess jurisdiction, the California statute was not preempted by ERISA.

SUMMARY OF ARGUMENT.

Jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(2) because the Court of Appeals found that California Revenue and Taxation Code section 18817 is preempted by ERISA insofar as it allows the Board to levy on a welfare plan to collect a participant's delinquent taxes. Two other cases regarding the preemption of a State law by ERISA have been considered on appeal by this Court. *See Delta Airlines v. Kramarsky* (2d Cir. 1981) 666 F.2d 21, vacating (2d Cir. 1981) 650 F.2d 1287, prob. juris. noted, (1982) 102 S.Ct. 1968 and *Alessi v. Raybestos-Manhattan, Inc.* (1981) 451 U.S. 504.

The District Court did not have subject matter jurisdiction of this case. The Board brought this action for failure to honor garnishment and declaratory relief originally in State court. The action was based solely on State law. It did not "arise under" the laws, treaties or Constitution of the United States. The federal question was raised merely as a defense to the Board's causes of action.

California's tax levy statute is not preempted by ERISA because it does not regulate the terms and conditions of the vacation plan in this case. Rather, it is a statute of general application which operates in the field of tax collection, a field that is unrelated to the regulation of ERISA plans.

ERISA never specifically preempts California's tax levy statute. In the area of taxation, one of the police powers of the States, a statute will only be preempted if Congress expressly so states. Congress is capable of prohibiting levies and garnishment against federally regulated programs and it has done so with regard to veterans' benefits, social se-

curity and railroad retirement benefits. It has not protected vacation plans from levies of any kind.

ERISA's preemptive authority with regard to welfare plans is limited. ERISA, as originally enacted, contained Titles I through IV. Only Titles I and IV supersede State laws. Title IV has no application at all to welfare plans and Title I contains sections which do not apply to welfare plans. Only State laws which regulate in those specific areas are preempted. This case engenders none of the preemptive sections of ERISA.

This Court has already considered and rejected the argument that ERISA preempts California's community property laws. The Jurisdictional Statement in the case of *In re Marriage of Campa* (1979) 89 Cal.App.3d 113, 152 Cal.Rptr. 362, appeal dismissed, (1980) 444 U.S. 1028 set forth the question of whether ERISA preempted California's community property law. This Court dismissed the appeal for want of a substantial federal question which is a decision on the merits.

Numerous courts have found an exception in the ERISA preemption section within the context of spousal and child support. These courts have allowed ex-spouses and children of ERISA participants to levy on ERISA covered pension plans because it was determined this would further an important public purpose. This exception has been found notwithstanding the fact that pension plans are highly regulated by every section of ERISA and are specifically covered by ERISA's anti-alienation section.

Since pension plans have been breeched for important public purposes, it would be logical to assume that courts would allow levies against vacation funds. Indeed, two courts have allowed credit unions to levy on these funds. The case at bar is the first time as far as the Board is aware

that any court has prohibited a levy or garnishment against a vacation fund.

The California statute does not conflict with any provision of ERISA in regard to welfare benefits. Congress did provide in ERISA that pension plans shall not be assigned or alienated, but provided no language to give the same protection to welfare plans. It follows that Congress had no intent to give welfare plans the same protection.

The *Alessi* case centered on a state statute that directly regulated a calculation of pension benefits. Clearly, this was an attempt to "regulate" a pension trust. In *Alessi*, this Court carefully delineated that the decision on preemption applied only to the case before it and the court was not deciding the "outer bounds" of ERISA's preemptive language.

The case at bar could not be controlled by *Alessi*, contrary to the holding of the Ninth Circuit in this case, because the concept of preemption with regard to a pension fund cannot be applied to a vacation fund. This would be extending the "outer bounds" of ERISA's preemptive language far beyond the language of ERISA itself and the precise language used by this Court in the *Alessi* decision.

Furthermore, in contrast to the situation in *Alessi*, the California statute does not regulate a term or condition of CLVT's vacation plan.

Congress and this Court have been in agreement that federal courts should not interfere in the fiscal operations of the States. This Court has recognized the dangers inherent in disrupting the administration of State tax systems. Congress did not intend for ERISA to interfere with a State's tax collection statute.

ERISA should be interpreted in a manner which supports its constitutionality. If California is precluded by ERISA from collecting its taxes, this raises the question of whether ERISA violates the Tenth Amendment.

ARGUMENT.

I.

INTRODUCTORY STATEMENT.

The Ninth Circuit has prohibited the State of California from levying on a vacation fund partially regulated by ERISA.

The effect of this decision is to allow a potential of 400,000 individuals in California to shield their yearly vacation pay from a California tax levy. This vacation pay is collected as a benefit to the workers in the construction industry and is in no way related to the primary purpose of ERISA which is the protection of pension trusts. The Board contends there is no meaningful difference between this vacation fund and a bank account established by a worker not covered by ERISA. In the instance of a vacation bank account, no creditor would be denied access to these monies, particularly a State taxing agency.

It must be emphasized at the outset that ERISA regulates "employee benefit plans" which includes "pension plans" and "welfare plans." Since ERISA was enacted primarily as pension reform legislation, all of its provisions apply to pension plans. By contrast, only the provisions regarding information and disclosure, fiduciary responsibility and administration and enforcement apply to welfare plans.

The Construction Laborers Vacation Trust for Southern California (CLVT) is a "welfare plan," which was established to provide vacation benefits to its participants. It is not a "pension plan." CLVT will be referred to as a welfare plan or vacation fund.

To demonstrate the minimal level of protection this CLVT vacation fund has in contrast to pension funds, it is important to note that if the yearly vacation fund is not properly applied for or the check not cashed in a timely fashion, the money

reverts back to the fund. (Trust Agreement, Sections 9.03-9.04; J.A. 46.) How can this vacation pay be allowed to pay for administrative costs of the fund and yet be denied to the State of California as a source of collection for delinquent taxes?

The Board will be discussing numerous factors which support its position in this case. These include the following:

1. ERISA was enacted primarily as pension reform legislation.
2. Welfare plans (here vacation funds) are less regulated than pension plans.
3. The California statute does not regulate the terms or conditions of the vacation fund.
4. Congress has not expressly prohibited States from levying on vacation funds.
5. Numerous courts have found States' domestic relations laws not to be preempted by ERISA and have allowed levies against pension plans.
6. The vacation funds in this case revert to the CLVT for administrative expenses if the worker does not follow the proper procedures.
7. The Internal Revenue Service is allowed to levy against welfare and pension plans.

It is evident that in balancing the vital interest of the State of California in collecting its revenue against the purposes of a vacation fund, the conclusion is inescapable that California must be allowed to collect delinquent taxes from this fund.

II.

THE COURT OF APPEALS FOUND THAT CALIFORNIA REVENUE AND TAXATION CODE SECTION 18817 IS PREEMPTED AS APPLIED. THEREFORE, JURISDICTION IS PROPERLY INVOKED UNDER 28 U.S.C. § 1254(2).

On December 13, 1982, this Court agreed to hear the appeal of the Board, but postponed further consideration of jurisdiction to the hearing of the case on the merits. (J.A. 106.)

The Court of Appeals has held that California Revenue and Taxation Code section 18817 is preempted by ERISA and is unconstitutional as applied under the Supremacy Clause insofar as Revenue and Taxation Code section 18817 allows the Board to levy on an employee welfare benefit plan (in this case a vacation fund) to collect a participant's delinquent taxes. Thus, this Court's jurisdiction is properly invoked under 28 U.S.C. § 1254(2). (*See Delta Airlines v. Kramarsky* (2d Cir. 1981) 666 F.2d 21, vacating (2d Cir. 1981) 650 F.2d 1287, prob. juris. noted, (1982) 102 S.Ct. 1968 and *Alessi v. Raybestos-Manhattan, Inc.* (1981) 451 U.S. 504 wherein Courts of Appeal held state statutes preempted by ERISA.)

It is sufficient to invoke this Court's jurisdiction under 28 U.S.C. § 1254(2) that the state law was preempted by federal law, *see, Minnesota v. Northern State Power Co.* (1972) 405 U.S. 1035, aff'g. (8th Cir. 1971) 447 F.2d 1143 and that the state law was held invalid as applied to the circumstances of a particular case. (*New Orleans v. Dukes* (1975) 427 U.S. 297, 301; *Dutton v. Evans* (1970) 400 U.S. 74, 76, n. 6.)

The policy underlying 28 U.S.C. § 1254(2) is to ensure that state laws are not erroneously invalidated. (*New Orleans v. Dukes, supra*, 427 U.S. at 302.)

While the Board contends that the District Court did not have jurisdiction over this case, this Court still has jurisdiction under 28 U.S.C. § 1254(2) to hear and decide this appeal. *See Healy v. Ratta* (1934) 292 U.S. 263 where this Court had appellate jurisdiction to decide that the District Court did not have jurisdiction of a case because the amount in controversy did not meet the statutory minimum.

For these reasons, the Board contends this Court has jurisdiction to hear this appeal.

III.

THE UNITED STATES DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OF THIS ACTION.

It should be noted at the outset that the United States District Court did not have jurisdiction of this suit and after CLVT removed the action to the District Court, it should have been remanded to the State court.

A civil action may be removed from a State court where the District Court would have original jurisdiction of the action. (28 U.S.C. § 1441.)

In this case, the District Court did not have original jurisdiction because the Board's causes of action originally filed in State court were based solely on State law. Federal law (ERISA) was raised merely as a defense to the causes of action.[2]

The Board had the right to sue CLVT for failure to honor garnishment pursuant to California Revenue and Taxation Code sections 18817 and 18818 and the right to sue for declaratory relief pursuant to California Code of Civil Procedure section 1060. The Board's causes of action were not predicated on federal law; its authority to levy was authorized by State law.

It is clear that federal jurisdiction must be established solely by the complaint. (*Skelly Oil Co. v. Phillips Co.* (1950) 339 U.S. 667, 673-674; *Gully v. First National Bank* (1936) 229 U.S. 109, 113; *Tennessee v. Union & Planters' Bank* (1894) 152 U.S. 454, 459.)

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[2]CLVT alleged in its petition for removal that the subject action involved an employee benefit plan and thus the District Court had original jurisdiction over this action under ERISA sections 403(c)(1) and 404, 29 U.S.C § 1103(c)(1) and 29 U.S.C § 1104 which deal with fiduciary responsibility and ERISA section 514, 29 U.S.C. § 1144, which deals with preemption. (J.A. 88.)

The federal claim must not be asserted by way of defense. (*Gully v. First National Bank, supra,* 299 U.S. at 113.) The federal question must be disclosed upon the face of the complaint, unaided by the answer and the complaint itself will not serve as a basis of jurisdiction insofar as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense. (*Phillips Petroleum Co. v. Texaco Inc.* (1974) 415 U.S. 125, 127-128; *Gully v. First Nat. Bank, supra,* 299 U.S. at 113.)

This Court has repeatedly and clearly held that in order for a claim to arise "under the Constitution, laws, or treaties of the United States," a right or immunity created by the Constitution or laws of the United States must be an essential element of the plaintiff's cause of action. (*Phillips Petroleum Co. v. Texaco Inc. supra,* 415 U.S. at 127; *Gully v. First Nat. Bank* (1936) 299 U.S. at 112.)

The *Gully* case concerned an action by the State Collector of Taxes against a national bank as agent for its shareholders. This Court took the case to consider the jurisdiction of the District Court and decided that the District court did not have jurisdiction. This Court said:

> "Not every question of federal law emerging in a suit is proof that a federal law is the basis of the suit. The tax here in controversy if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it." (*Gully, supra,* 299 U.S. at 115.)

This is directly analogous to the case at bar in that California imposed the income tax under State law and was attempting to collect it solely under State law. By raising

the question of ERISA and preemption as a defense, CLVT could not give the United States District Court jurisdiction.[3]

Preemption is ordinarily a matter to be raised as a defense. Taken alone, it is not a proper basis for removal. *Guinasso v. Pacific First Fed. Sav. & Loan Assn.* (9th Cir. 1981) 656 F.2d 1364, 1366; *State of Washington v. American League of Prof. Base. Clubs* (9th Cir. 1972) 460 F.2d 654, 660.

The New York District Court case of *Nat. Bank of N. America v. Loc. 553 Pension Fund, Etc.* (E.D. N.Y. 1978) 463 F.Supp. 636, is very similar to the instant case. In that case, the provisions of ERISA were raised as a defense by the Trustees to an action of a judgment creditor to garnish a portion of a beneficiary's monthly pension benefits. The case was filed in State court and removed to Federal court. The District Court granted the motion to remand. The court stated that "[T]he resolution of this motion turns on whether the claim sued upon arises under federal law." (463 F.Supp. at 638.)

The Trustees argued that the case arose under federal law pursuant to ERISA section 502(a)(1)(B). (29 U.S.C. § 1132(a)(1)(B).) The court rejected the Trustees' argument and held that the creditor's claim and the relief sought derived entirely from state, rather than federal law. Thus, the District Court did not have subject matter jurisdiction. (463 F.Supp. at 639.)

California's claim did not "arise under" federal law. Federal law was raised only as a defense. Thus, the District Court did not have original jurisdiction of this case and it should not have been removed to federal court.

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[3]Any question of federal law raised by CLVT may be decided by the State court. This court recently reiterated the principle that State courts, like Federal courts, have a constitutional obligation to uphold federal law. (*California v. Grace Brethren Church* (1982) 102 S.Ct. 2498, 2513 n.37. Accord *Ex Parte Royall* (1885) 117 U.S. 241, 248.)

IV.

CALIFORNIA'S LEVY STATUTE IS NOT PREEMPTED BY ERISA SECTION 514(a).

A. California's Statute Does Not Relate to Benefit Plans Within the Meaning of ERISA Section 514.

ERISA section 514(a), 29 U.S.C. § 1144(a) provides that "State" laws *relating* to employee benefit plans are superseded. The term "State" is defined to mean ". . . a State . . . which purports to *regulate*, directly or indirectly, the *terms* and *conditions* of employee benefit plans. . . ." (Emphasis added.) (ERISA section 514(c)(2), 29 U.S.C. § 1144(c)(2).)

The more restrictive language of ERISA section 514(c)(2) qualifies the "relate to" language of ERISA section 514(a).[4] Thus, a State law only "relates" to an employee benefit plan if it *regulates* the *terms* and *conditions* of the plan. Clearly, California's levy statute is a law of general application which does not *regulate* a *term* or *condition* of the vacation fund. Rather, California's levy statute seeks only to implement the state's sovereign power to assess and collect taxes by securing the payment of delinquent taxes through a tax levy on vacation funds.

By specifically choosing the word "regulate", Congress shows it had no intention to preempt state laws that have no direct bearing on benefit plans. If Congress had intended to preempt state laws which had a peripheral effect on benefit plans, it could have used more general words such as "affect," "influence," or "connected with," or it could have provided that ERISA plans are totally immune from

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[4]See 25 U.C.L.A. L.Rev. 417, 515-516 (1978) and dissenting opinion of *Franchise Tax Bd., Etc. v. Const. Laborers, Etc.* (9th Cir. 1982) 679 F.2d 1307, 1312.

all State laws.[5] "ERISA section 514(a) was not . . . designed to preempt any state law with even the most tangential relation to ERISA." (*Stone v. Stone* (N.D. Cal. 1978) 450 F.Supp. 919,932, aff'd. (9th Cir. 1980) 632 F.2d 740, cert. denied (1981) 453 U.S. 922.) There is a "narrow category of laws which 'affect' employee benefit plans but which do not 'relate' to them within the meaning of § 514(a)." (*Id.*)

In *Provience v. Valley Clerks Trust Fund* (E.D. Calif. 1981) 509 F.Supp. 388, the District Court held that California's laws regarding fraud, bad faith, and intentional infliction of emotional distress did not "relate to" the employee benefit plan at issue and that State law will not be preempted by ERISA where the law has only an indirect effect on the plan, and where the law is one of general application which involves an area of important state concern. (509 F.Supp. at 391.) The California levy statute is just such a law of general application which involves the collection of taxes, an area of important state concern.

B. A State's Tax Statute Must Not Be Preempted by Implication.

ERISA does not specifically preempt California's tax levy statute and preemption by implication in the area of tax law would be contrary to decisions of this Court which have held that where Congress has legislated in a field which the States have traditionally occupied, " 'the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purposes of Congress.' " (*Ray v. Atlantic Richfield Co.* (1977) 435 U.S. 151, 157; quoting *Rice v. Santa Fe Elevator Corp.* (1947)

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[5]*See* Dissenting opinion, *Franchise Tax Bd., Etc. v. Const. Laborers, Etc., supra*, 679 F.2d 1307, 1312.

331 U.S. 218, 223 and *Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 525.)

In deference to a State's domestic relations laws, this Court has held that those laws will only be preempted when Congress clearly has so provided. The Board contends that the same respect must be given to a State's tax laws. In *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, this Court has stated that when a state family law statute has come into conflict with a federal statute, this Court will determine:

> "... whether Congress has 'positively required by direct enactment' that state law be pre-empted. (Citation.) A mere conflict in words is not sufficient. State family and family property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden. (Citation.)" (439 U.S. at 581.)

It is clear that by enacting ERISA, Congress has not "positively required by direct enactment" that State tax levy statutes be preempted. In addition, these levy statutes do not do "major damage" to "clear and substantial" federal interests.

Congress has shown that it knows how to protect certain funds from state levy and attachment statutes when that is its intention. With respect to Social Security benefits, Congress has specifically said they could not be alienated or assigned and that they were not subject to "execution, levy, attachment, garnishment . . ." (42 U.S.C. § 407,) and with respect to Veteran's benefits, Congress has said such payments "shall be exempt from taxation" and "shall not be liable to attachment, levy, or seizure . . ." (38 U.S.C. § 3101(a).)

The Railroad Retirement Act of 1974 explicitly states that Railroad Retirement annuities are not subject to any tax. The Railroad Retirement Act of 1974 provides that "no

annuity . . . shall be assignable or be subject to any tax or to garnishment, attachment, or other legal process under any circumstances whatsoever, nor shall the payment thereof be anticipated. . . ." (45 U.S.C. § 231m.)

In *Hisquierdo v. Hisquierdo, supra*, 439 U.S. 572, this Court held that Railroad Retirement benefits are not subject to California's community property laws. As a part of its analysis of the Railroad Retirement Act, this Court pointed out that:

> "Even state collection laws must bow to its [the Railroad Retirement Act] command, for Congress added that phrase in an amendment designed in part to ensure that neither federal nor state tax collectors would encroach on the distribution of benefits." (*Hisquierdo v. Hisquierdo, supra*, 439 U.S. at 584.)

The Railroad Retirement Act's specific prohibition against a tax levy must be compared with ERISA which does not mention levy or garnishment at all.

These statutes and cases show how explicit Congress can be in protecting certain federal beneficiaries from general or tax levies. ERISA, which does not prohibit levy or garnishment at all, does not have this protective and explicit wording, particularly with regard to tax levies.

C. ERISA's Preemptive Authority With Regard to Welfare Plans Is Limited.

ERISA was enacted primarily as pension reform legislation. The basic purpose of ERISA was to protect the millions of people who depend on benefits from private pension plans for financial independence after retirement.[6]

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[6](*Stone v. Stone* (N.D. Cal. 1978) 450 F.Supp. 919, 926, aff'd. (9th Cir. 1980) 632 F.2d 740, cert. denied (1981) 453 U.S. 922; H. Rep. No. 93-533, 93d Cong., 2d Sess., 1974 U.S. Code Cong. and Admin. News, pp. 4639, 4640-4641; S. Rep. No. 93-127, 93d Cong., 2d Sess., 1974 U.S. Code Cong. and Admin. News, pp. 4838, 4839-4840.)

ERISA comprehensively regulates pension plans. Congress did not regulate as thoroughly with regard to welfare plans. Specifically, there are sections of ERISA which apply to *pension* plans only and do not apply to welfare plans. Both the statement of legislative intent contained in ERISA section 2, 29 U.S.C. § 1001 and the provisions of ERISA indicate that Congress meant to confine federal regulation of welfare plans to establishing minimum standards for reporting and disclosure and fiduciary responsibility. The regulation of pension trusts is much more pervasive.

As Justice Tang, the dissenting Justice in the opinion below, stated:

> "ERISA's limited regulation of welfare plans strongly suggests that Congress was more concerned with the possible dissipation of pension benefits than with the possible loss of employee welfare benefits. This difference in concern should not be surprising. In real world terms, the loss of one's pension is far more catastrophic than the loss of funds devoted to financing an annual vacation." (*Franchise Tax Bd., Etc. v. Const. Laborers, Etc.* (9th Cir. 1982) 679 F.2d 1307, 1311; dissenting opinion.)

ERISA, as originally enacted, contains Titles I through IV. Title I of ERISA is entitled Protection of Employee Benefit Rights. Title II concerns Amendments to the Internal Revenue Code Relating to Retirement Plans; Title III concerns Jurisdiction, Administration, Enforcement; Joint Pension Task Force, Etc., and Title IV concerns Plan Termination Insurance.

ERISA § 514(a) provides that only Titles I and IV will preempt State laws, thus narrowing the preemptive effect of ERISA. With regard to welfare plans, this preemptive effect has been further restricted because all of Title IV and parts of Title I do not apply to welfare plans.

The five sub-parts of Title I are as follows:

Part 1 — Reporting and Disclosure
Part 2 — Participation and Vesting
Part 3 — Funding
Part 4 — Fiduciary Responsibility
Part 5 — Administration and Enforcement

All of the sections of Title I apply to pension plans, while only the sections regarding reporting and disclosure, fiduciary responsibility and administration and enforcement apply to welfare plans. Welfare plans have been specifically excluded with regard to the parts entitled participation and vesting and funding.[7]

Thus, with regard to welfare plans, the only preemptive effect of ERISA would be where a State law regulated the terms and conditions of a welfare plan concerning information and disclosure, fiduciary responsibility or administration and enforcement. Revenue and Taxation Code § 18817 does not regulate ERISA plans in any way. Thus it is not preempted.

V.

STATE LAWS THAT FURTHER AN IMPORTANT PUBLIC PURPOSE HAVE NOT BEEN PREEMPTED BY ERISA.

All State laws cannot be preempted by ERISA because numerous courts have allowed levies authorized by State laws against pension funds and vacation funds when it was determined that this would further an important public purpose.

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[7] ERISA section 201(1), 29 U.S.C. § 1051, ERISA section 301(a)(1), 29 U.S.C. § 1081(a)(1).

A. Levies Against *Pension* Funds.

1. Domestic Relations.

Many courts have found that States' domestic relations laws are not preempted and have required trustees of ERISA-regulated pension plans to pay some or all of the pension payments directly to a participant's ex-spouse or children.[8]

These courts have allowed former spouses to garnish ERISA-regulated *pension* trusts due to the strong policy of deferring to the domestic relations laws of the states. This exception has been found notwithstanding the fact that pension plans are specifically addressed at ERISA section 206(d)(1), 29 U.S.C. 1056(d)(1) and pension plans are regulated by every section of ERISA.

In addition to the many courts which have held that domestic relations laws are not preempted by ERISA, the Departments of Labor and Treasury have also supported this concept.

In *American Tel. and Tel. Co. v. Merry* (2d Cir. 1979) 592 F.2d 118, the court pointed out that the amicus curiae brief filed for the Secretaries of Labor and Treasury argued that there is an implied exception to ERISA's anti-alienation provision for the enforcement of family support obligations. This is in contrast to the case at bar where the Department

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[8]*Carpenters Pension Trust Etc. v. Kronschnabel* (9th Cir.) 632 F.2d 745; cert. denied, (1981) 453 U.S. 922; *In re Marriage of Campa* (1979) 89 Cal.App.3d 113, 152 Cal.Rptr. 362, appeal dismissed for want of substantial federal question (1980) 444 U.S. 1028; *Operating Engineers, Etc. v. Zamborsky* (9th Cir. 1981) 650 F.2d 196; *Stone v. Stone* (N.D. Cal. 1978) 450 F.Supp. 919, aff'd. (9th Cir. 1980) 632 F.2d 740, cert. denied (1981) 453 U.S. 922; *American Tel. & Tel. Co. v. Merry* (2nd Cir. 1979) 592 F.2d 118; *Cody v. Riecker* (E.D. N.Y. 1978) 454 F.Supp. 22, affirmed (2nd Cir. 1979) 594 F.2d 314; *Central States, Southeast & Southwest Areas Pension Fund v. Parr* (E.D. Mich. 1979) 480 F.Supp. 924; *Senco of Florida, Inc. v. Clark* (M.D. Fla. 1979) 473 F. Supp. 902; *Cartledge v. Miller* (S.D. N.Y. 1978) 457 F. Supp. 1146.

of Labor advised CLVT not to honor the Board's levy, alleging that ERISA had preempted California's statute. (J.A. 71.)

The Board contends there is no justification for the Department of Labor's position that in one instance a pension may be levied against and in the next instance a clearly less regulated welfare plan cannot be levied against when the motivation in both cases is an important public purpose for the State.

The Ninth Circuit in *Operating Engineers v. Zamborsky* (9th Cir. 1981) 650 F.2d 196 held that an ERISA regulated pension fund was subject to garnishment by an ex-spouse to satisfy alimony obligations. The Court found that Congress did not intend to preempt the area of domestic relations.

The Court in *Stone v. Stone* (9th Cir. 1980) 632 F.2d 740, cert. denied (1981) 453 U.S. 922 affirmed the District Court decision, *Stone v. Stone* (1978) 450 F.Supp. 919, which held that ERISA did not preempt a state court from ordering an ERISA-regulated pension plan to pay a a portion of a plan participant's pension benefits directly to his or her ex-spouse.

The Ninth Circuit in *Carpenters Pension Trust, Etc. v. Kronschnabel* (9th Cir. 1980) 632 F.2d 745, cert. denied (1981) 453 U.S. 922 (relying on the case of *In re Marriage of Campa* (1979) 89 Cal.App.3d 113, 152 Cal.Rptr. 362, appeal dismissed (1980) 444 U.S. 1028), held that ERISA does not preempt State court orders directing an ERISA-regulated pension plan to pay a community property share of a pension plan participant's monthly benefit payments directly to his or her ex-spouse.

The Second Circuit in *American Tel. and Tel. Co. v. Merry* (2nd Cir. 1979) 592 F.2d 118 held that an ex-spouse

could garnish ERISA-regulated *pension* benefits to satisfy alimony and support obligations. The Second Circuit stated that it would be unreasonable to conclude "that Congress intended to preempt even those state laws that only in the most remote and peripheral manner touch upon pension plans." (*Id.* at p. 121.)

In the case of *In re Marriage of Campa, supra*, 89 Cal.App.3d 113, 152 Cal.Rptr. 362, appeal dismissed (1980) 444 U.S. 1028, the California Court of Appeal held that ERISA does not preempt a state court order in a dissolution which requires the trustees of an ERISA pension plan to divide pension payments between the employee and his or her ex-spouse. The California Supreme Court denied the pension plan's petition for hearing. (89 Cal.App.3d at 132) The pension plan appealed to this Court.[9]

This Court dismissed the pension plan's appeal for want of a substantial federal question, (1980) 444 U.S. 1028, which is a decision on the merits. (*Hicks v. Miranda* (1975) 422 U.S. 332, 343-345.)

In dismissing the *Campa* appeal for want of a substantial federal question, this Court has already considered and rejected the argument that ERISA preempts a state-court order requiring the trustees of a pension plan to make certain

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[9]The Jurisdictional Statement in *Campa* set forth the following questions on appeal:

1. Do the provisions of Title 1 of the Employee Retirement Income Security Act, commonly known as ERISA, supersede the provisions of the California community property law and implementing statutes and court rules insofar as they relate to an employee benefit plan covered by that Act?
2. Does a state court have jurisdiction to order the board of trustees of an employee pension benefit plan covered by ERISA to make benefit payments in violation of the provisions of the documents and instruments governing the plan?

The Jurisdictional Statement was reprinted in *Carpenters Pension Trust, etc. v. Kronschnabel* (9th Cir. 1980) 632 F.2d at 748.

payments to a participant's ex-spouse. (*Carpenters Pension Trust, Etc. v. Kronschnabel, supra,* 632 F.2d 745, 748.)

It is clear that if a State's domestic relations laws are not preempted under ERISA section 514(a), 29 U.S.C. § 1144(a), then State laws with respect to tax levies should not be preempted, especially when the levy is against a welfare plan.

2. Judgment Creditors.

In *National Bank of N.A. v. Intern. Broth., etc.* (1979) 419 N.Y.S.2d 127, 69 A.D.2d 679, appeal dismissed, 48 N.Y.2d 752, 422 N.Y.S.2d 666, 397 N.E.2d 1333, the court allowed a creditor to levy on or garnish a pension trust regulated by ERISA. The Trustees argued first that ERISA preempts all State statutes which affect the regulation of pension plans and next argued that garnishment was expressly prohibited by ERISA section 206(d), 29 U.S.C. § 1056(d). The court held that there was no absolute preemption of the State's procedures for enforcing money judgments.

The court concluded:

> "A State will be pre-empted only when it tends to invade an aspect of the regulation of pension funds that is governed by ERISA as established in the Federal act. However, New York's vital interest in assuring the enforceability of our courts' judgments is wholly peripheral to the purposes of ERISA (citation). [The state statute] makes no attempt to regulate pension plans and presents no cognizable encroachment upon the exclusive province of ERISA regulation." (419 N.Y.S.2d at 130.)

The Board contends that the *National Bank of N.A.* case is directly analogous to the case at bar as again, the State statute makes absolutely no attempt to regulate ERISA welfare plans.

B. Levies Against Vacation Funds.

It is clear from the authority previously discussed that under ERISA, pension trusts have been more closely guarded than vacation funds, but even the pension trust can be invaded for a variety of reasons. Vacation plans do not enjoy the same high protection. Thus, it is not surprising that courts have allowed levies against vacation funds even by creditors who did not have a high public purpose such as the collection of public revenue.

A recent case from the District Court in Ohio declined to follow the majority opinion in the case at bar and instead relied on the analysis of Justice Tang, the dissenting Justice, to find that a creditor could levy on a vacation fund.

The case of *Local Union 212, Etc. v. Local 212 IBEW Credit Union* (S.D. Ohio, 1982) 549 F.Supp. 1299 is analogous to the one now before this Court. In *Local Union 212*, a credit union attempted to garnish certain beneficiaries' interests in an ERISA-covered vacation trust fund established by a bargaining agreement. The District Court, relying on the reasoning of Justice Tang, found that ERISA does not preclude a creditor from garnishing a vacation fund. The court based this opinion on its conclusion that ERISA § 206(d)(1), 29 U.S.C. § 1056(d)(1) protected only pension plans and not vacation plans, and that ERISA 514(a), 29 U.S.C. § 1144(a) did not preempt the garnishment because Congress did not intend to protect vacation plans from garnishment. The court noted that in order for preemption to come into play, there must be some express or implied provision of ERISA which deals with vacation plans. The court found none. (549 F.Supp. at 1302.)

Finally, the court concluded that the garnishment statute did not "relate to" the vacation fund; and that any "regulating" effect on the plan regarding the administrative ex-

pense of processing the garnishment notices, was minimal. (*Id.*)

In another case, the Supreme Court of Missouri allowed a credit union to garnish a vacation fund. At issue in *Elec. Workers v. IBEW-NECA Holiday Trust* (1979) 583 S.W.2d 154, was whether a credit union could garnish the Holiday Trust Fund pursuant to a judgment it had obtained against an IBEW member.

The Court allowed the credit union to garnish the fund. The Court found that the Missouri state law was not preempted and there was no conflict with ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1), because the Holiday Trust was not a pension benefit plan. The Court then had to consider whether ERISA section 514(a), 29 U.S.C. § 1144(a) would preempt Missouri's state law.

Citing the test set forth in *Stone v. Stone*, the Court stated, "The question we must answer is whether the Missouri state laws and policies we might wish to apply 'fall into [the] narrow category of laws which affect employee benefit plans but which do not relate to them within the meaning of [§ 1144(a)].' " (*Elec. Workers, supra*, 583 S.W.2d at 158.)

The court then discussed the cases which have broadly construed ERISA section 514(a), 29 U.S.C. § 1144(a) and contrary cases such as *Stone v. Stone, supra*, which "have been reluctant to invalidate so much state legislation when the intent of Congress is not unmistakenly clear." (*Elec. Workers, supra*, 583 S.W.2d at 159.) The Court agreed with the court in *Gast v. Oregon* (1978) 36 Or.App. 441, 585 P.2d 12 that Congress did not mean "to pre-empt areas of state regulation not addressed by ERISA or to leave such areas totally unregulated . . ." (*Id.*) The court concluded, "The enforcement of state court money judgments by

creditors is a valid area of state concern, and is one which is totally unregulated by ERISA with respect to welfare plans." (*Id.*)

VI.

CALIFORNIA'S LEVY STATUTE DOES NOT DIRECTLY CONFLICT WITH ANY PROVISION OF ERISA REGARDING WELFARE PLANS.

Congress has been silent regarding the alienation of the vacation benefits involved in this lawsuit. Therefore, the California statutes which allow the Board to levy on vacation benefits do not directly conflict with ERISA and a conflict should not be implied.

There is no section of ERISA which prohibits the Board from levying on a welfare or vacation fund. This must be contrasted with ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) which specifically provides that "Each *pension* plan shall provide that benefits provided under the plan may not be assigned or alienated." (Emphasis added.) It is clear that ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) applies only to pension funds and does not cover "employee welfare benefit plans" such as the vacation fund at issue. (*Local Union 212, Etc. v. Local 212 IBEW Credit U.* (S.D. Ohio, 1982) 549 F.Supp. 1299; *Elec. Workers v. IBEW-NECA Holiday Trust* (1979) 583 S.W.2d 154, 157, 159.)[10]

Although ERISA specifically protects pension plans from alienation (the Board has discussed numerous exceptions), there is no language in ERISA or the legislative history

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[10]ERISA section 201, 29 U.S.C. § 1051 which defines the coverage of Part 2, Participation and Vesting, excludes employee welfare benefit plans (vacation funds) from its coverage. ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) is a part of Part 2, Participation & Vesting. Therefore, by the terms of ERISA section 201(1), 29 U.S.C. § 1051 and by the terms of ERISA section 206(d)(1), 29 U.S.C. § 1056(d)(1) itself, the non-alienation language applies only to pension plans.

which indicates that Congress intended to protect vacation plans from garnishment proceedings by a beneficiary's creditors. (*Local Union 212, Etc. v. Local 212 IBEW Credit U., supra*, 549 F.Supp. 1299, 1302.)

Congress has recognized the different status of pension and welfare plans and has specifically stated that pension plans should not be alienated but has not afforded the same protection to welfare plans. If Congress had intended to impose non-alienation conditions on welfare plans, it would have done so clearly and unambiguously. The fact that Congress did not prohibit the alienation of welfare plans is strong evidence that Congress did not intend to prohibit levies against these funds.

VII.

THE ALESSI CASE DID NOT DECIDE THE QUESTION OF PREEMPTION WITH REGARD TO WELFARE PLANS.

Two of the Ninth Circuit Justices in the case at bar relied on the case of *Alessi v. Raybetos-Manhattan, Inc.* (1981) 451 U.S. 504 to find that California's tax levy statute was preempted. The Board contends that *Alessi* has no application to the case at bar.

In *Alessi* this Court found that a New Jersey statute was preempted by ERISA section 514(a), 29 U.S.C. § 1144(a), because it eliminated one method for calculating ERISA pension benefits that was permitted by federal law. This Court found that the New Jersey law applied directly to the calculation of the ERISA pension benefits. (*Alessi, supra*, 451 U.S. at 524-525.)

In the *Alessi* case, this Court noted that it was only deciding the case before it and was not deciding the question of how broadly ERISA's preemption section should be applied. This Court said:

> "We need not determine the outer bounds of ERISA's pre-emptive language to find this New Jersey provision an impermissible intrusion on the federal regulatory scheme." (*Alessi, supra*, 451 U.S. at 525.)

The Franchise Tax Board contends that the *Alessi* case has no application to the case at bar because *Alessi* concerned *pension* trusts while the case at bar concerns *vacation* trusts.

In addition, the New Jersey statute obviously was a direct regulation of ERISA pension plans because it mandated how they must not be calculated. The California statute, by contrast, does not even mention ERISA plans and in no way attempts to regulate ERISA-covered benefits.

VIII.

CONGRESS IS CONCERNED WITH THE FISCAL OPERATIONS OF THE STATES.

Congress has recognized the importance of not interfering with a State's right to manage its fiscal affairs and thus never intended ERISA to be used as a method of interfering with the collection of taxes. By enacting 28 U.S.C. § 1341, Congress has provided that no district court shall enjoin the assessment, levy or collection of a tax. In several recent cases interpreting that statute, and in cases relying on the principle of comity, this court has repeatedly held that the federal courts shall not interfere with a State's ability to collect its taxes. (*See California v. Grace Brethren Church* (1982) 102 S.Ct. 2498, 2509; *Fair Assessment In Real Estate v. McNary* (1981) 454 U.S. 100; *Rosewell v. La Salle National Bank* (1981) 450 U.S. 503, 522; *Tully v. Griffin, Inc.* (1976) 429 U.S. 68, 73; *Great Lakes v. Huffman* (1943) 319 U.S. 293, 298.)

In addition, this Court has recently stated: "This Court has long recognized the dangers inherent in disrupting the

administration of state tax systems." *California v. Grace Brethren Church* (1982) 102 S.Ct. 2498, 2509, n.23.

The Board contends that this principle is directly applicable to the case at bar. It is obvious that if ERISA is interpreted to prohibit California from levying on a vacation fund, it will interfere with the revenue collection process of the State of California. Congress never intended ERISA to have this effect.

IX.

THE NINTH CIRCUIT HAS ERRONEOUSLY CONSTRUED ERISA IN A MANNER WHICH INTERFERES WITH THE SOVEREIGN RIGHT OF CALIFORNIA TO ASSESS AND COLLECT TAXES.

ERISA should be interpreted in a manner which supports its constitutionality. Therefore, ERISA should not be interpreted to preclude a State from assessing and collecting its taxes, rights reserved to the States under the Tenth Amendment.

The power to tax is an incident of sovereignty and is coextensive with sovereignty. (*Harvester Co. v. Dept. of Taxation* (1944) 322 U.S. 435, 444-445; *Curry v. McCanless* (1938) 307 U.S. 357, 366. It follows that "A necessary incident of power to tax property is the power to uniformly enforce the collection of the tax by any constitutional means deemed appropriate to that end." (*United States v. Hester* (10th Cir. 1943) 137 F.2d 145, 147-148.)

The State of California has a vital interest in collecting taxes from taxpayers. This vital interest was recognized long ago by this Court in *Dows v. City of Chicago* (1870) 78 U.S. (11 Wall.) 108, where a National Bank tried to restrain the collection of a tax levied by the City of Chicago upon the bank's capital shares. This Court decided that no court could enjoin the collection of the tax, and stated as follows:

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible." (*Dows, supra*, 78 U.S. at 110.)

This court has also stated that "The prompt payment of taxes is always important to the public welfare. It may be vital to the existence of a government." (*Springer v. United States* (1880) 102 U.S. (12 Otto) 586, 594), and that "[T]axes are the lifeblood of government, and their prompt and certain availability an imperious need." (*Bull v. United States* (1935) 295 U.S. 247, 261; *Accord G.M. Leasing Corp. v. United States* (1977) 429 U.S. 338, 350.)

ERISA section 514(a) may be unconstitutional if it interferes with the sovereign right of the State of California to uniformly collect taxes from all of its citizens. Thus, ERISA should be interpreted so that it does not interfere with this right. As this Court said in *Machinists v. Street* (1961) 367 U.S. 740, 749, "Federal statutes are to be construed as to avoid serious doubt of their constitutionality." (*Accord, Lynch v. Overholser* (1962) 369 U.S. 705, 710-711.) In *Fry v. United States* (1975) 421 U.S. 542, this Court stated as follows:

> "While the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered,' (Citation), it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." (421 U.S. at 547 n. 7.)

In *National League of Cities v. Usery* (1976) 426 U.S. 833, this Court held that even the Commerce Clause did not

give Congress the authority to intrude upon a State's performance of essential government functions. This Court said:

> "We have repeatedly recognized that there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." (426 U.S. at 845.)

The Franchise Tax Board respectfully contends that the Ninth Circuit's interpretation of ERISA is incorrect in that Congress did not intend to preempt California's statute. Furthermore, ERISA should not be interpreted to interfere with the sovereign power of California to assess and collect its taxes.

CONCLUSION.

First, the Board unmistakeably demonstrated that the District Court had no jurisdiction over this case. Secondly, the arguments presented herein are conclusive in validating the Board's right to levy against a vacation fund by showing the clear distinction between a pension trust and a vacation fund. ERISA's beneficial purposes are not affected or regulated in any way by the Board's levy.

The restrictive language of *Alessi* regarding preemption as it affects pension trusts shows that the Board is justified in collecting delinquent taxes from a vacation fund. In addition to this, numerous courts have stated that even the sensitive area of pension trusts can be invaded for a high public purpose. Two courts have shown no compunction to protect vacation funds from ordinary creditors.

For these reasons, the Board respectfully contends that the decision of the Ninth Circuit Court of Appeals below should be reversed.

Respectfully submitted,

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APPENDIX.

Constitutional and Statutory Provisions.

United States Constitution Article VI, cl. 2:
Supreme Law of the Land

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution of laws of any State to the contrary notwithstanding.

United States Constitution, Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C. § 1254 provides in pertinent part:

Courts of appeals; certiorari, appeal; certified questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) . . .

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

28 U.S.C. § 1331
Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

28 U.S.C. § 1441 provides in pertinent part:

Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

ERISA, 29 U.S.C., provides in pertinent part:

Subchapter I

Protection Of Employee Benefit Rights

Subtitle A — General Provisions

§ 1001 Congressional findings and declaration of policy (ERISA § 2)

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important

factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect

thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

Subtitle B — Regulatory Provisions

Part 1 — Reporting and Disclosure

§ 1021 Duty of disclosure and reporting (ERISA § 101)

Part 2 — Participation and Vesting

§ 1051 Coverage (ERISA § 201)

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than —

(1) an employee welfare benefit plan;

§ 1056(d)(1) Assignment or alienation of plan benefits (ERISA § 206(d)(1))

Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

Part 3 — Funding

§ 1081 Coverage (ERISA § 301)

(a) This part shall apply to any employee pension benefit plan described in section 1003(a) of this title, (and not exempted under section 1003(b) of this title), other than —

(1) an employee welfare benefit plan; . . .

Part 4 — Fiduciary Responsibility

§ 1103 Establishment of trust (ERISA § 403)

. . . .

. . . .

(c)(1) Except as provided . . . the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

. . . .

§ 1104 Fiduciary duties (ERISA § 404)

(1) Subject to sections . . . a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

Part 5 — Administration and Enforcement

§ 1132 Civil enforcement (ERISA § 502)

Persons empowered to bring a civil action

(a) A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) Except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (ii) of this section.

. . . .

. . . .

. . . .

Jurisdiction

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

Amount in controversy; citizenship of parties

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

. . . .

. . . .

California Revenue and Taxation Code section 18818 provides as follows:

§ 18818. Liability for failing to withhold pursuant to notice.

Any employer or person failing to withhold the amount due from any taxpayer and to transmit the same to the Franchise Tax Board after service of a notice pursuant to Section 18817 is liable for such amounts.

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CLERK

No. 82-695
IN THE

Supreme Court of the United States

October Term, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF APPELLEES.

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Questions Presented.

1. Does the United States District Court possess subject matter jurisdiction, under the provisions of 28 U.S.C. Sections 1331, 1337 and 1441(a), of a lawsuit filed by a state agency against a trust fund regulated pursuant to the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001, *et seq.* ("ERISA") where the complaint specifically seeks a declaratory judgment that the pre-emptive provisions of ERISA do not immunize the trust fund from the imposition of liens created by state law, and where the agency specifically challenges an advisory opinion of the U.S. Department of Labor finding that the trust fund is immune, by virtue of the provisions of ERISA, from such levies?

2. Do the provisions of 29 U.S.C. Section 1132(a)(3) and 29 U.S.C. Section 1132(e)(1), which provide exclusive federal jurisdiction over civil actions by fiduciaries to obtain equitable relief from acts violative of the provisions of ERISA or from acts which violate the terms of the trust instrument, provide an independent basis for jurisdiction?

3. Do the provisions of Section 514 of ERISA, 29 U.S.C. Section 1144, explicitly or impliedly preempt the right of the State of California to levy on the assets of an employee benefit trust fund subject to regulation under ERISA, where the State's levy would interfere with the purposes for which the trust fund was created and would impose administrative expenses and burdens upon the trust fund unauthorized by federal law?

4. If the answer to the preceding question is in the affirmative, does such preemption contravene rights of the State of California preserved by the Tenth Amendment to the U.S. Constitution?

Parties to This Action.

The parties to this action are:

1. The Franchise Tax Board of the State of California.
2. The Construction Laborers Vacation Trust for Southern California.
3. Edward Ashton.
4. Al Atwood.
5. Gary Bronneck.
6. John R. Clarke.
7. R.C. Gallyon.
8. Richard Greenberg.
9. Roger Jaska.
10. William Middleton.
11. Tony Hoffman.
12. William R. McClain.
13. Armando Lopez.
14. Joe Rivera.
15. Ray M. Wilson.
16. James Keyes.
17. Boyd McDougal.
18. Carlos Cerna.

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No. 82-695

IN THE

Supreme Court of the United States

October Term, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,
Appellees.

BRIEF OF APPELLEES.

I.
STATEMENT OF THE CASE.

This is an action instituted by the Franchise Tax Board of the State of California ("the Board") against the Construction Laborers Vacation Trust for Southern California ("CLVT") and its individual Trustees ("Trustees"). The action was originally filed in the Superior Court of the State of California for the County of Los Angeles. Within thirty days after service of the action, the CLVT and the Trustees filed a Petition for Removal of the action to the United States District Court for the Central District of California. The Board filed a Motion for Remand, which was denied by the U.S. District Court.

The CLVT filed a Motion to Dismiss the Complaint, together with a supporting memorandum. The Board timely filed a written opposition to the Motion to Dismiss. The

U.S. District Court elected, with the consent of the parties, to treat the Motion to Dismiss as if cross-motions for summary judgment had been filed. Treating the Motion to Dismiss in this fashion, the District Court granted summary judgment in favor of the Board and denied summary judgment to the CLVT.

The CLVT filed a timely Notice of Appeal, and the case was briefed and argued before a panel of the U.S. Court of Appeals for the Ninth Circuit. On June 22, 1982, the Court of Appeals issued a decision, one judge dissenting, reversing the decision of the U.S. District Court and remanding the case for further proceedings.

The Board filed a Notice of Appeal to the Supreme Court of the United States on September 17, 1982. On October 18, 1982, the appeal was docketed, and the Board's Jurisdictional Statement was filed. On November 17, 1982, the CLVT filed a motion to dismiss the appeal for want of a substantial federal question or, in the alternative, to summarily affirm the decision below.

On December 13, 1982, this Court entered an Order postponing the determination of jurisdiction to the hearing on the merits.

II.
OPINIONS BELOW.

The opinion of the U.S. Court of Appeals for the Ninth Circuit was filed on June 22, 1982; it is reported at 679 F.2d 1307 (Appendix A to Jurisdictional Statement). The Order of the U.S. Court of Appeals for the Ninth Circuit denying the Petition for Rehearing was filed on July 21, 1982 and is not officially reported (Appendix D to the Jurisdictional Statement). The Judgment of the U.S. District

Court for the Central District of California was entered on December 4, 1980; it is not officially reported (Appendix B to the Jurisdictional Statement).

III.
STATUTES INVOLVED.

In addition to the statutes set forth in the Brief of the Franchise Tax Board, the following statute is material to this proceeding:

Section 514(b)(5) of ERISA, 29 U.S.C. Section 1144(b)(5), added by Public Law 97-473, signed into law on January 14, 1983, provides:

> "(5)(A) Except as provided in subparagraph (B), subsection (a) shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).
>
> "(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a) —
>
> (i) *Any state tax law relating to employee benefit plans* or
>
> (ii) Any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974 to the extent that it provides for more than the effective administration of such Act as in effect on such date." [Emphasis supplied.]

IV.
STATEMENT OF FACTS.

The facts in the within action are undisputed. The following facts appear in the Complaint and attached exhibits:

1. This is an action instituted by the Franchise Tax Board of the State of California (the "Board") against the Construction Laborers Vacation Trust for Southern California ("CLVT") and its Trustees ("Trustees"). The action seeks to obtain a declaratory judgment that it is empowered

to issue Notices to Withhold, under the provisions of California Revenue & Taxation Code Section 18817, to employee benefit trust funds governed by the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA").

2. The CLVT is an employee benefit trust, established through collective bargaining between the Southern California District Council of Laborers (the "Union") and various employers' associations. (*See* Complaint at Jt. App., pp. 11-56.)[1]

3. The CLVT is administered by a Board of Trustees. Eight Trustees are designated by the Union; an equal number are designated by the employers' associations. (Complt., Par. 5, Exh. "A," Art. V.)

4. Employers bound to collective bargaining agreements with the Union are obligated to make contributions to the CLVT for each hour of work performed by laborers whose work is covered by such agreements. (Complt., Exh. "A," Art. VI.)

5. The Trustees of the CLVT administer the CLVT pursuant to the terms of a Trust Agreement promulgated by the settlors of the Trust. (Complt., Exh. "A," Art. V.)

6. The contributions made by employers to the CLVT are accumulated by the CLVT, which maintains a "vacation account" for each covered laborer. Annually, at a time specified by the Trustees, a check for the accumulated vacation benefits is paid to each covered employee, when the employee has satisfied the requirements set forth in the Trust Agreement. (Complt., Exh. "A," Art. IX.)

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[1]References to the Joint Appendix are abbreviated, for convenience, as "Jt. App."

7. The CLVT is a type of forced savings plan, or "spendthrift" trust, designed to insure that the beneficiaries (individual laborers) do not dissipate the benefits they are eligible to receive through the Trust until they are actually eligible for each year's lump sum payment. The Trust Agreement contains stringent provisions designed to insure that covered workmen do not use their Trust accounts to obtain credit or otherwise dispose of the sums payable to them before they are actually received.[2]

8. From time to time, the CLVT receives Notices to Withhold, issued by the Board, seeking to require the CLVT

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[2]Article 9.08 of the Trust Agreement provides:

> "It is the intent and purpose of the Plan, and of this Agreement, and a material part of the consideration for the making of contributions to the Fund by individual employers, that the money in each vacation account shall be received by the employee entitled thereto personally. Accordingly, *no payments due the Fund and no monies in the vacation accounts established pursuant to the Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge by any employee or other person and any such anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge shall be void and ineffective*. The money credited to a vacation account shall be subject to withdrawal and distribution *only* at the times and *in the manner* and *for the purposes* specified in this Agreement." [Emphasis supplied.]

Similarly, Section 4.06 of the Trust Agreement provides:

> "Each employee or beneficiary under the Plan is hereby restrained from selling, transferring, anticipating, assigning, hypothecating or otherwise disposing of his benefits hereunder or any other right or interest under the Plan, and the Board of Trustees shall not recognize, or be required to recognize, any such sale, transfer, anticipation, assignment, hypothecation or other disposition. Any such benefit, right or interest shall not be subject in any manner to voluntary transfer *or transfer by operation of law* or otherwise, *and shall be exempt from the claims of creditors or other payments and from all orders, decrees, garnishments, executions or other legal or equitable process of proceedings to the fullest extent permissible by law*." [Emphasis supplied.]

to set aside funds which the Board claims individual laborers owe the State of California in back taxes and/or penalties.[3]

9. The Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1001, *et seq.*, regulates the operation of "employee benefit plans." It is undisputed that vacation trusts like the CLVT are "employee welfare benefit plans" within the meaning of ERISA.[4]

10. In order to determine whether the Trust is obligated to respond to the orders of state judicial and administrative agencies seeking to levy upon benefits due beneficiaries of the Trust, co-counsel for the Trust wrote to the U.S. Department of Labor, which is charged with administering portions of ERISA, to request an advisory opinion. On

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[3]The authority of the Board to issue such Notices to Withhold is contained in California Revenue & Taxation Code Section 18817, which provides:

> "The Franchise Tax Board may by notice, served personally or by first class mail, require any employer, person, officer or department of the State, political subdivision or agency of the State . . . having in their possession, or under their control, any credits or other personal property or other things of value, belonging to a taxpayer . . . to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest, or penalties due from the taxpayer . . . and to transmit the amount withheld to the Franchise Tax Board at such times as it may designate."

[4]29 U.S.C. Section 1002(1) provides, in pertinent part:

> "The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or *vacation benefits*, apprenticeship or other training programs . . ."

29 U.S.C. Section 1002(3) further provides:

> "The term 'employee benefit plan' or 'plan' means an employee benefit plan or an employee pension plan or a plan which is both an employee benefit plan and an employee pension plan."

December 28, 1979, the U.S. Department of Labor issued an advisory opinion stating, in pertinent part:

> "It is the position of the Department of Labor that the process of any state judicial or administrative agency seeking to levy for unpaid taxes or unpaid unemployment insurance contributions upon benefits due a participant or beneficiary under the Plan is preempted under ERISA §514."[5] (Jt. App., pp. 68-72.)

11. The Advisory Opinion of the Department of Labor concludes that the garnishment by state agencies of the assets of ERISA-regulated trust funds would be inconsistent with the provisions of Sections 403(c) and 404(a) of ERISA, which generally forbid the disbursement of trust fund assets except to provide benefits and defray trust fund expenses.[6] *Id.*

12. Based on the advisory opinion letter issued by the U.S. Department of Labor, the CLVT has not processed the Notices to Withhold issued by the Board. (Complt., Exh. "H.")

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[5]Section 514 of ERISA, 28 U.S.C. Section 1144, provides, in pertinent part, as follows:

> "(a) Except as provided in subsection (b) of this section, the provisions of this title and Title IV shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in Section IV(a) and not exempt under Section IV(b). This section shall take effect January 1, 1975
>
> . . .
>
> (c) For purposes of this section:
>
> (i) The term 'state law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any state. A law of the United States applicable only to the District of Columbia shall be treated as a state law rather than a law of the United States.
>
> (ii) The term 'state' includes a state, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, *directly or indirectly*, the terms and conditions of employee benefit plans covered by this title." [Emphasis supplied.]

[6]Section 403(c) of ERISA provides, in pertinent part, that

> "The assets of a plan . . . shall be held for the exclusive purposes of providing benefits to participants in the plan and their bene-

(footnote continued on following page)

V.
ARGUMENT.

A. The District Court Properly Assumed Jurisdiction of This Action.

1. The Remedial Provisions of ERISA Support the Assertion of Jurisdiction by the District Court in This Case.

At the outset, it is important to note that the jurisdictional issue raised by the Board in this case arises solely as a matter of happenstance. The Board's original complaint seeks a declaratory judgment that the "preemption" provisions of ERISA do not permit the Trustees to refuse to remit monies sequestered by the Board pursuant to a Notice to Withhold.

Had the action been initiated by the CLVT, instead of the Board, no jurisdictional question would exist.

Under the provisions of Section 502(a)(3) of ERISA, the Trustees, as fiduciaries, may bring an action "(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . ." *See* 29 U.S.C. Section 1132(a)(3). The U.S. District Courts are given "exclusive jurisdiction" of such actions; *see* 29 U.S.C. Section 1132(e)(1). These statutory provisions have been recognized by courts as estab-

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ficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. Section 1103(c)(1).

Section 404(a)(1) of ERISA provides, in pertinent part, that

". . . A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan." 29 U.S.C. Section 1104(a)(1).

lishing "a federal policy favoring federal adjudication of the content of fiduciary duties under ERISA." See *Wong v. Bacon*, 445 F. Supp. 1177, 1188 (N.D. Cal. 1977).[7]

The Board would have this Court find that no federal jurisdiction exists in this case, simply because the Board beat the Trustees through the courthouse door. Such a position would seriously undermine the apparent desire of Congress to have sensitive issues of fiduciary responsibility determined by the federal judiciary.[8] Neither the District Court nor the Ninth Circuit Court of Appeals were persuaded by the Board's argument.

Moreover, it is well established that federal courts have power to re-align the parties and pleadings in an action to achieve the ends of justice. *See* FRCP 8(c) and (f); *Wong v. Bacon, supra.*

In the present case, no answer or counterclaim was filed by the Trust and the Trustees, since the U.S. District Court elected to treat the defendants' Motion to Dismiss as if cross-motions for summary judgment had been filed by the parties. Nevertheless, it is clear that the contents of the

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[7]The same court noted that "It would be ironic for a federal court to defer to a state court for a determination of federal law that Congress wanted the federal courts to decide." *Id.*

[8]Had the CLVT and its Trustees filed an action seeking to enjoin agents of the Board from attempting to garnish assets of the CLVT, the situation would be comparable to that in *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323 (2d Cir. 1982) and *Rath Packing Co. v. Becker*, 535 F.2d 1295 (9th Cir. 1975) *aff'd sub nom. Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305 (1977). In the *Stone & Webster* and *Rath Packing* cases, employers sought injunctive relief against state efforts to regulate their businesses, on the ground that federal law had preempted the subject matter of the regulation. *See also Braniff International, Inc. v. Florida Public Service Commission*, 576 F.2d 1100 (5th Cir. 1978). Certainly the "federal question" is as present in this action as it was in *Stone & Webster* and *Rath Packing*. It would be an exercise in empty formalism to hold that federal question jurisdiction does not exist in this case, merely because the CLVT is the defendant, rather than the plaintiff.

Petition for Removal and Motion to Dismiss filed by the CLVT and the Trustees contain all the elements of the legal claim these parties have against the Board. The courts below could properly have considered these pleadings to constitute a counterclaim by the CLVT and the Trustees against the Board, for which jurisdiction would clearly lie under Section 502(a)(3) of ERISA, 29 U.S.C. Section 1132(a)(3). *Cf. Wong v. Bacon*, 445 F. Supp. 1177, 1184 (N.D. Cal. 1977) [treating the answer of trustees of a pension trust as a counterclaim, and, viewing the answer as such, finding that an independent jurisdictional basis existed for the counterclaim].

It is well settled that where an independent jurisdictional basis exists for entertaining a counterclaim, the District Court may entertain it, despite an absence of jurisdiction over the principal claim. See *International Video Corp. v. Ampex Corp.*, 484 F.2d 634, 636-637 (9th Cir. 1973); *National Research Bureau, Inc. v. Bartholomew*, 482 F.2d 386, 388-389 (3d Cir. 1973).

Viewing the Petition for Removal and Motion to Dismiss filed by the CLVT and the Trustees as a "counterclaim," it is clear that federal jurisdiction would lie.

Viewing the Petition for Removal and Motion to Dismiss as constituting a "counterclaim" will further the ends of justice in this case. No prejudice will accrue to the Board, since the Board was well aware of the legal claim of the CLVT and the Trustees even before this lawsuit was filed. (*See* Complt., Exh. "H", Jt. App. 66-67).[9] Furthermore,

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[9]Indeed, it is clear that the Appellees actually *invited* the Board to file suit to resolve the important question of federal law raised by this case. On January 7, 1980, following receipt of the Department of Labor's Advisory Opinion, Lionel Richman, co-counsel to the CLVT, wrote to the Board to advise them of the opinion. The letter notes that the CLVT would not be taking steps to disburse the funds sought by the Board for approximately a month "in the event you desire to institute legal action to test this opinion." (Complt., Exh. "H", Jt. App. 66-67.)

no useful purpose would be served by requiring the preparation of an additional pleading, labeled "counterclaim," when the parties' dispute is purely a legal one, which is adequately addressed in the pleadings already filed. Though it may be conceded that, as a matter of procedural nicety, it would have been desirable for the District Court to have postponed the hearing on defendants' Motion to Dismiss until the pleadings were fully developed,[10] the substantive result would not have been affected.

2. The Case Arises Under Federal Law.

Any civil action of which the federal district courts would have original jurisdiction "founded on a claim or right arising under the Constitution, treaties or laws of the United States" is properly removable to a U.S. District Court, if filed in a state court. *See* 28 U.S.C. Section 1441(b).

The question of what types of cases "arise under" the laws of the United States is a troublesome one, which has generated much litigation.[11] As the Board notes in its Brief,

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[10]If the CLVT and Trustees had initiated their own suit in federal court, or if the District Court had delayed ruling on the legal question in this case until after the CLVT and Trustees had filed an answer and counterclaim, the situation would be parallel to that in *First Federal Savings & Loan Assn. of Boston v. Greenwald*, 591 F.2d 417, 423 (1st Cir. 1979). In *Greenwald*, a state bank commissioner brought suit in state court to enforce certain provisions of Massachusetts law allegedly applicable to federal savings and loan associations operating in the State of Massachusetts; the defendants removed the case to federal court, where they had filed a federal court action seeking declaratory judgment on the question of whether federal law preempted the right of the state to enforce its laws and regulations. On appeal, the First Circuit avoided deciding whether jurisdiction existed in U.S. District Court to hear the *state's* action, since jurisdiction over the claim of the savings and loan associations, which had been consolidated with that of the state, was clear.

[11]As one commentator has noted: "One of the most perplexing exercises in American law practice is the effort to define with certainty the original jurisdiction of the lower federal courts in matters where there is no diversity of citizenship." London, " *'Federal Question' Jurisdiction — A Snare and Delusion*," 57 Mich.L.Rev. 835 (1959).

it has generally been held that the jurisdictional basis for the claim must be established by reference solely to the complaint.[12] See *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 70 S.Ct. 876 (1950); *Gully v. First National Bank*, 299 U.S. 109, 113, 57 S.Ct. 96, 98 (1936); *Wong v. Bacon*, 445 F. Supp. 1177, 1182 (N.D. Cal. 1977).

In the present case, the Complaint makes detailed and explicit reference to the provisions of ERISA on which the present dispute turns. The Board alleges, in its Complaint, that it has issued Notices to Withhold, pursuant to California Revenue & Taxation Code Section 18817, to the CLVT, and that the CLVT has notified the Board that it "would not disburse the funds levied upon to either [the Trust beneficiaries involved] or to the Board pending the receipt of an opinion letter from the Administrator, Pension and Welfare Benefit Programs, United States Department of Labor, as to whether defendants are permitted to honor said liens under the provisions of the Employee Retirement Income Security Act of 1974." (*See* Complaint, Paras. 9, 11 and 14; Jt. App., pp. 5-7.)

The Complaint further alleges that on January 7, 1980, the CLVT notified the Board that "the defendants would not honor levies made upon them by the State of California pursuant to an advisory opinion from the United States Department of Labor." (Complt., Para. 15; Jt. App., pp. 6-7.) The U.S. Department of Labor's advisory opinion is attached as Exhibit "H" to the Complaint. The opinion

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[12]Some commentators have criticized the rule that the face of the complaint must be the sole source of the "federal question," suggesting, instead, that the trial court retain each case until the pleadings become fully developed, to determine whether a genuine federal question exists; *see* Chadbourn and Levin, *Original Jurisdiction of Federal Questions*, 90 U.Pa.L.Rev. 639, 665 (1942); Troutman, *Federal Right Jurisdiction and the Declaratory Remedy*, 7 Vand.L.Rev. 445, 460 (1954).

letter extensively discusses the application of the preemptive provisions of ERISA to the facts of this case. It states:

> "[I]t is the position of the Department of Labor that the process of any state judicial or administrative agency seeking to levy for unpaid taxes or unpaid unemployment insurance contributions upon benefits due a participant or beneficiary under the Plan is preempted under ERISA § 514."

Thus, there can be no serious question that the Complaint and the exhibits incorporated therein, fully raise the federal question at issue in this case.[13]

The Board appears to contend that federal question jurisdiction does not exist because the *remedy* invoked by the Board is conferred by state law. However, it is now well settled that the controlling question is not whether the *remedy* is federally provided, but whether the determinative issues in the case necessarily require interpretation of federal law.[14] This Court has not endorsed the proposition that the

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[13]Several lower courts have suggested that where issues of federal preemption are present, the federal question need not even appear on the face of the complaint: "An exception to the requirement that the federal question appear on the face of the complaint is found where the state law giving rise to the action has been preempted by federal law." *Gardner v. Clark Oil & Refining Corp.*, 383 F. Supp. 151, 152 (E.D. Wis. 1974) [dicta]; citing *Fischer v. Holiday Inn of Rheinlander, Inc.*, 375 F. Supp. 1351 (W.D. Wis. 1973); *Fay v. American Cystoscope Makers*, 98 F. Supp. 278 (S.D.N.Y. 1951).

[14]Professor (and U.S. District Judge) Weinstein has stated: "What is usually meant . . . is that for a case to be one which 'arises under federal law,' the federal substantive element must be at least sufficiently central to the dispute so that it will have some impact on its outcome." *Sylgab Steel & Wire Corp. v. Strickland Transportation Co., Inc.*, 270 F. Supp. 264, 268 (E.D.N.Y. 1967).

Another commentator has suggested "[T]hat a suit arises under federal law whenever the plaintiff's complaint discloses actual, substantial reliance — at the time the judicial power is invoked — on a proposition of law that touches on federal primary relationships." Note: "*The Outer Limits of 'Arising Under'* " 54 NYU L.Rev. 978, 979 (1979).

Other commentators have suggested that it is relevant to consider the importance of the federal legal issue raised, and the extent to which federal expertise may assist in the resolution of the issue. *See, e.g.*, Cohen, "*The Broken Compass: The Requirement That a Case Arise 'Directly' Under Federal Law*," 115 U.Pa.L.Rev. 890, 906 (1967).

"cause of action" must be one arising under federal law. *See, e.g., Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180, 199-202, 41 S.Ct. 243 (1921).

In *Gully v. First National Bank*, 299 U.S. 109, 57 S.Ct. 96, 99 (1936), relied upon by the Board, it was held that federal question jurisdiction would exist when the right asserted was such that "it will be supported if the . . . laws of the United States are given one construction or effect, and defeated if they receive another." This is clearly a case in which the right of the Board to levy tax assessments on the CLVT "will be supported if the . . . laws of the United States are given one construction or effect, and defeated if they receive another." That, in fact, is the whole point of this lawsuit.

Moreover, the *Gully* case involved the oblique application of federal law in an area in which federal regulation is less than pervasive. By contrast, the present action, like that before the Court in *Oneida Indian Nation of New York State v. County of Oneida*, 414 U.S. 661, 94 S.Ct. 772 (1974) involves the application of federal law in an area Congress consciously sought to fully occupy; *see* 29 U.S.C. Section 1144(a), and legislative history discussed, *infra*.

The circuit courts of appeal have also expressed the view that the remedy sought is not determinative. In *T.B. Harms Co. v. Eliscu*, 339 F.2d 823 (2d Cir. 1964), the Second Circuit Court of Appeals stated that "even though the claim is created by state law, a case may 'arise under' a law of the United States if the complaint discloses a need for determining the meaning or application of such law." 339

F.3d at 827.[15] *See also North American Phillips Corp. v. Emery Air Freight Corp.*, 579 F.2d 229 (2d Cir. 1978).

In *North Davis Bank v. First National Bank of Layton*, 457 F.2d 820 (10th Cir. 1972) an action was initiated in state court in Utah by a local bank, which sought to enjoin a competing bank from constructing a drive-in banking facility across the street from its main quarters. No federal remedy was sought. The defendant bank removed the case to federal court, asserting that the case necessarily raised questions of federal banking law. On appeal, the Tenth Circuit Court of Appeals affirmed, finding that the removal was proper, because several banking terms defined by federal law would have to be construed in order to determine the outcome of the case.

The Board seeks to avoid the application of these principles by arguing that the application of ERISA to the facts of this case is purely a matter of defense, which is not a

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[15]Other courts have adopted the so-called "pivotal question" formulation. The Second Circuit has stated that the test of whether a complaint presents a federal question is: "whether the complaint is for a remedy expressly granted by an act of Congress or otherwise 'inferred' from federal law, or whether a properly pleaded 'state created' claim itself presents a 'pivotal question of federal law,' for example because an act of Congress must be construed . . ." *Ivy Broadcasting Co. v. American Telephone & Telegraph Co.*, 391 F.2d 486, 489 (2d Cir. 1968) quoting *McFaddin Express, Inc. v. Adley Corp.*, 346 F.2d 424, 426 (2d Cir. 1965),*cert. denied*, 382 U.S. 1026, 86 S.Ct. 643 (1966).

Essentially the same test was adopted by the Third Circuit in *Warrington Sewer Company v. Tracy*, 463 F.2d 771 (3d Cir. 1972); *see also Garrett v. Time-D.C., Inc.*, 502 F.2d 627 (9th Cir. 1974); *Mountain Fuel Supply Co. v. Johnson*, 586 F.2d 1375, 1381 (10th Cir. 1978); *Lindy v. Lynn*, 501 F.2d 1367, 1369 (3d Cir. 1974); *Sweeney v. Abramovitz*, 449 F. Supp. 213 (D. Conn. 1978). *See generally*, Note, "The Outer Limits of 'Arising Under,' " 54 NYU L.Rev. 978 (1979).

proper ground for the invocation of federal jurisdiction.[16] Even where the federal question is primarily a matter of defense, however, the courts have held jurisdiction to be proper, if the defendant could have brought its own action in federal court:

> "It is plain that the federal law that gives rise to a federal question must be an element of the plaintiff's complaint. The well-pleaded complaint rule precludes taking jurisdiction on the basis of an anticipated federal defense. However, a suit for a declaratory judgment that defendant does not have a right under federal law, in circumstances in which a coercive action by the defendant based on his supposed federal law right would be cognizable in federal court, is now held to be within federal question jurisdiction." 13 Wright & Miller, *Federal Practice & Procedure*, Section 3562 (West 1975).
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> *See also*, Note: "Federal Jurisdiction over Declaratory Suits Challenging State Action," 79 Col.L.Rev. 982, 983 (1979).

In this action, it is quite clear that the CLVT and its Trustees could have brought a suit in federal court, to obtain declaratory relief regarding the right of the CLVT to be

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[16]Appellees are aware that there is an apparent split among the members of this Court with regard to the question of whether a defense based upon federal preemption of state law, where it is "pivotal" to the outcome of the case, is a claim "arising under" federal law for the purposes of 28 U.S.C. Section 1141(b). See *Kerr-McGee Chemical Corporation v. Illinois*, ___ U.S. ___, 103 S.Ct. 469 (1982) (BLACKMUN, J., concurring in the denial of certiorari; WHITE, J., joined by MARSHALL, J., dissenting from the denial of certiorari). For the reasons expressed in Part A.1. of the Argument herein, however, Appellees believe it is unnecessary for the Court to reach this issue. If the pleadings filed by the CLVT and the Trustees are viewed, for substantive purposes, as constituting a "counterclaim," then it is clear that *exclusive* federal jurisdiction to hear such a claim resides in the U.S. District Courts. *See*, discussion, *supra*, Argument, Part A.1.

immune from garnishment orders issued by state agencies.[17] The suit is in its present posture solely because the Board elected to bring suit first. Regardless of the party initiating the declaratory relief action, the "pivotal question" for decision is the same: Whether ERISA preempts the right of the State of California to levy upon trust assets. *Cf. Shareholders Management Co. v. Fred F. Gregory*, 449 F.2d 326 (9th Cir. 1971).

As the Ninth Circuit majority noted, the defendant Trustees are "fiduciaries" within the meaning of ERISA, 29 U.S.C. Section 1002(14)(A). As such, they are precluded from disbursing CLVT funds in any manner other than prescribed in 29 U.S.C. Sections 1103(c)(1) and 1104(a)(1). As a practical matter, no court could determine the obligations of the defendant Trustees without focusing on the explicit provisions of ERISA controlling the disbursal of Trust monies.

The decision of the Ninth Circuit in *Guinasso v. Pacific First Federal Savings & Loan Assn.*, 656 F.2d 1364 (9th Cir. 1981) relied upon by the Board and the dissent below, contains dicta which strongly suggests that the assertion of

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[17]Federal courts have occasionally realigned the claims of the parties in order to eliminate any question regarding the propriety of federal jurisdiction. In *Wong v. Bacon*, 445 F. Supp. 1177 (N.D. Cal. 1977), a U.S. District Court found that the plaintiffs' original complaint, seeking restitution of improper trust fund payments under California law, did not adequately raise a federal issue. However, the answer of the defendant trustees raised important federal questions under ERISA. Rather than dismiss the action, the U.S. District Court elected to view the defendants' answer as a "counterclaim for a declaratory judgment against plaintiffs." Having characterized the pleadings in this fashion, the Court found that the Court-created "counterclaim" adequately raised a federal question and that jurisdiction was proper. No such judicial legerdemain was performed in this action. The Board's Complaint clearly raises the federal issue. However, the *Wong* case is noteworthy because it demonstrates that federal courts recognize the important federal legal issues at stake in cases raising claims of preemption by ERISA.

jurisdiction in this case was proper. The *Guinasso* opinion states: "A suit arises under federal law within 28 U.S.C. Section 1331 if the complaint, properly pleaded, *presents a substantial dispute over the effect of federal law, and the result turns on the federal question.*" 656 F.2d at 1366, citing *Spokane County Legal Services, Inc. v. Legal Services Corp.*, 614 F.2d 662, 667 (9th Cir. 1980); *Standage Ventures, Inc. v. Arizona*, 499 F.2d 248, 249 (9th Cir. 1974). [Emphasis supplied.]

The *Guinasso* opinion goes on to note that "a suit arises under an act of Congress regulating commerce within 28 U.S.C. Section 1337 if it seeks relief granted or implied by the act or '*hinges on' the act's interpretation.*"[18] [Emphasis supplied.] *Guinasso, supra*, 656 F.2d at 1366, citing *Garrett v. Time-D.C., Inc.*, 502 F.2d 627, 629 (9th Cir. 1974), *cert. denied*, 421 U.S. 913, 95 S.Ct. 1569 (1975).

All suits relating to the terms of an employee benefit plan or the actions of plan fiduciaries "arise" under federal substantive law, whether brought in state or federal court, just as suits involving a breach of a collective bargaining agreement arise under federal law. Section 502(e) of ERISA vests the federal courts with exclusive jurisdiction over all actions authorized under ERISA, except that state courts are given

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[18]It is also noteworthy that *Guinasso* is apparently inconsistent with the decision of the Ninth Circuit in *Meyers v. Beverly Hills Federal Savings & Loan Assn.*, 499 F.2d 1145 (9th Cir. 1974). In *Meyers*, the plaintiffs sought to invalidate prepayment penalties imposed by federal savings and loan associations, on the ground that they violated California law. The suit was brought in state court, and the defendant savings and loan associations removed the case to federal court. In the federal court proceeding, the defendants successfully asserted a defense of federal preemption to plaintiffs' claims. The *Guinasso* court distinguished *Meyers* by noting that the jurisdictional question was not extensively considered therein. *See also Rath Packing Co. v. Becker*, 535 F.2d 1295 (9th Cir. 1975), *aff'd on other grounds sub nom. Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305 (1977).

concurrent jurisdiction over benefit claim cases which do not involve application of Title I of ERISA.

Just as the courts are charged under LMRA § 301, 29 U.S.C. § 185, to develop a federal common law of the collective bargaining agreement, *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912 (1957), to be applied in suits on such agreements in state as well as federal court, *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95, 82 S.Ct. 571 (1962),[19] so too has Congress directed and authorized the courts to develop a federal common law of employee benefits to effectuate and supplement the provisions of ERISA. *Murphy v. Heppenstall Co.*, 635 F.2d 233, 237 (3rd Cir. 1980), *cert. denied*, ___ U.S. ___, 102 S.Ct. 999 (1982); *Woolfork v. Marine Cooks & Stewards Union*,

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[19]The Court should not overlook the strong possibility that § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), provides an independent basis for the assertion of federal jurisdiction over this action. It is now settled that a trust agreement, such as that creating the CLVT, is an employer-union contract of the type covered by § 301. See *Rehmar v. Smith*, 555 F.2d 1362, 1366 (9th Cir. 1976); *Carpenters Local 626 v. Delaware Contractors Assn.*, 344 F. Supp. 1281 (D. Del. 1972), *aff'd. per curiam*, 477 F.2d 564 (3rd Cir. 1973) [action to determine lawfulness of administration of vacation fund;] *cf. Smith v. Evening News Association*, 371 U.S. 195, 200-01, 83 S.Ct. 267 (1962). In the present action, the Board seeks to compel the Trustees of the CLVT to do something which the Trust Agreement of the CLVT clearly forbids: disbursing funds to third parties in a manner not permitted by the CLVT Trust Agreement. The question of whether the Trustees will violate the CLVT Trust Agreement, and thus their fiduciary duties, by paying these monies to the Board is thus squarely in issue in the case. The declaratory relief requested by the Board in this case would necessarily obligate the District Court to interpret the provisions of the Trust Agreement and determine whether the Trust Agreement, together with the obligations imposed upon the Trustees by federal law, prevented the Trustees from delivering funds to the Board. Federal jurisdiction of such a claim lies under the provisions of § 301(a) of the LMRA. Moreover, the fact that § 301 is not specifically mentioned in the complaint is not controlling; see *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1212 (9th Cir. 1980); *Avco Corp. v. Aero Lodge No. 735*, 376 F.2d 337, 339-40 (6th Cir. 1967) ["The force of federal preemption in this area of labor law cannot be avoided by failing to mention Section 301 in the complaint."] *aff'd*, 390 U.S. 557, 88 S.Ct. 1235 (1968).

642 F.2d 966 (5th Cir. 1981); *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1334, 1351 (8th Cir. 1980); *Laborers Fringe Benefit Funds v. Northeast Concrete and Construction Co.*, 640 F.2d 1350 (6th Cir. 1981). *See Dependahl v. Falstaff Brewing Corporation*, 653 F.2d 1208 (8th Cir. 1981), *cert. denied*, 454 U.S. 968, 102 S.Ct. 512 (1982). This formulation of a federal substantive law of welfare and pension plans was viewed as a corollary to the virtually total federal preemption of the field. As noted by Senator Jacob Javits:

> "In view of Federal preemption, state laws compelling disclosure from private welfare or pension plans, imposing fiduciary requirements on such plans, imposing criminal penalties on failure to contribute to plans — unless a criminal statute of general application — establishing state termination insurance programs, et cetera, will be superceded. *It is also intended that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans.*" 120 Cong. Rec. 29, 942 (1974), III Legislative History of ERISA 4771, as quoted in *Murphy v. Heppenstall, supra* at 237.

This clear intent to federalize the law relating to employee benefit plans[20] compels the conclusion that any state court action which would require the interpretation or application

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[20]The Board's state court action *itself* was preempted by ERISA. State judicial and administrative proceedings which encroach upon the matters governed by ERISA may be enjoined. See, *e.g.*, *General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980) (federal court may enjoin state court proceedings which make it impossible for a plan fiduciary to carry out his duties); *Armco, Inc. v. Ludwick*, 3 EBC 1574 (D. Kan. 1982) (federal court enjoins state administrative hearing affecting plan); *Azzaro v. Harnett*, 414 F. Supp. 473 (S.D.N.Y. 1976), *aff'd*, 553 F.2d 93 (2d Cir. 1976), *cert. denied*, 434 U.S. 834 (1977) (state insurance commissioner may not conduct investigation of benefit plan governed by ERISA).

of ERISA to a plan document "arises under" the laws of or the United States and is subject to removal under § 1441. *Cf. Boys Market v. Retail Clerks Union*, 398 U.S. 235, 245, 90 S.Ct. 1583, 1589, n.11 (all suits under § 301 of the Labor Management Relations Act may be removed to federal court pursuant to 28 U.S.C. § 1441).

B. The Court of Appeals Correctly Held That the State's Right to Garnish Trust Assets Is Preempted by ERISA.

1. Section 514's Preemption of State Law Is Plainly Worded and Is Virtually Total.

The exceptional breadth of federal preemption intended by Congress in enacting ERISA is manifest in the language of Section 514, quoted *supra*. Section 514(b) expressly enumerates the *only* categories of state laws saved from the otherwise total preemption of Section 514(a). These enumerated exceptions in no way protect the California laws in question. Indeed, subsection (4) of Section 514(b) further evidences the pervasiveness of the provision's basic preemption by providing:

> Subsection (a) of this section shall not apply to any generally applicable *criminal* law of a State.

29 U.S.C. Section 1144(b)(4). (Emphasis added.) There is no such general provision relating to revenue laws or other civil laws.

The legislative intent underlying ERISA preemption is clear. Rejecting narrower formulations of preemption, Congress adopted Section 514 with the express intent of

foreclosing "endless litigation" over the "perimeters of preemption."[21]

Congress was cognizant of the potential consequences inherent in its foreclosing litigation over the scope of Section 514. It is recognized that its abrogation of the judiciary's power to define preemption on a case-by-case basis could result in unanticipated distortions. Accordingly, Congress provided a safety valve, a forum for consideration of such cases. That forum was not the courts, however; *it was Congress itself*. In Section 3022 of ERISA, Congress instructed the Joint Pension Task Force to monitor the effects and continuing desirability of its broad federal preemption of state laws relating to plans and to report the findings back to Congress for review and possible action. ERISA Section 3022(a)(4); (29 U.S.C. Section 1222(a)(4)).

In enacting ERISA, Congress burdened employee benefit plans with complicated and costly administrative and structural requirements regarding disclosure, fiduciary responsibility and other matters, for the purpose of protecting plan participants. At the same time Congress acknowledged that

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[21]A number of commentators have urged that the preemption provisions of ERISA be read broadly. *See, e.g.*, Hutchinson and Ifshin, "*Federal Preemption of State Law Under the Employee Retirement Income Security Act of 1974*," 46 U.Chi.L.Rev. 23 (1978):

> "We conclude that Congress intended to preempt almost all state regulation of employee pension and welfare benefit plans, but that courts have often defined the scope of preemption more narrowly where preemption may create what appear to be undesirable regulatory lacunae or supersede state law in fields traditionally left to state government. We argue that this continued whittling away of the preemptive reach of ERISA seriously threatens the regulatory scheme devised by Congress, and that it is up to Congress, not the courts, to narrow ERISA's preemption of state law where particular policy reasons make such action appropriate." *Id.* at 23-24.

See generally, Turza and Halloway, "*Preemption of State Laws Under the Employee Retirement Income Security Act of 1974*," 28 Catholic U.L.Rev. 163, 166-169 (1979) (discussing conflicting analyses).

employee benefit plans were voluntary and that ERISA had to be tailored *wherever possible* to reduce the burdens upon the plans. Congress expressly noted that disregard of this latter reality could produce an anomalous result. The statute designed to protect plan participants could prompt termination of the very plans in which they participate — in legislating the laying of golden eggs, Congress could kill the goose. *See* S. Rep. No. 383, 93rd Cong., 2d Sess. 18-19 (1973).

The Congressional mandate to the judiciary is thus clear in language, in legislative history, and in motive. Until further notice from Congress, ERISA's preemption of state law is inviolate. To the extent California's laws relate to employee benefit plans, they are preempted.

2. Congress Intended Section 514's Total Preemption to Be Given Full Effect by the Judiciary.

The legislative history of ERISA establishes that Congress intended the exceptional preemptive sweep created by the "plain words" of Section 514 to be given full effect. During the legislative hearings which preceded the enactment of ERISA, both houses of Congress were considering versions of a bill to requlate employee benefit plans. H.R. 2 (93rd Cong., 1st Session (1973)), from which the language of ERISA is largely derived, originally contained a preemption provision which was limited in scope. However, during the course of Joint House-Senate Conference Committee hearings to draft the final version of ERISA, a much more sweeping preemption provision was substituted. The Conference Report explains:

> "Under the substitute, the provisions of Title I are to supersede all state laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee

> organization that represents employees engaged in or affecting interstate commerce."

S. Rep. 1090 [H. Rep 1280], 93rd Cong., 2d Sess. 383 (1974) *reprinted in* "Legislative History of the Employee Retirement Income Security Act of 1974," Committee Print, 94th Cong., 2d Sess. 4650 (1976) (hereinafter "*Legislative History*").[22]

The remarks of Senator Jacob Javits, bill co-sponsor and senior minority member of the Senate Committee on Labor and Public Welfare, further amplify and delineate the Congressional preemptive scheme in ERISA. Senator Javits stated:

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[22]Senator Harrison Williams, Jr., bill co-sponsor and Chairman of the Senate Committee on Labor and Public Welfare, issued the following explanatory statement regarding the preemptive provisions of ERISA:

> "It should be stressed that, with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for federal regulation, thus eliminating the threat of conflicting or inconsistent state and local regulation of employee benefit plans. This principle is intended to apply *in its broadest sense* to all actions of state or local governments, or any instrumentality thereof, which have the force or effect of law." [Emphasis supplied.]

120 Cong. Rec. 2933 (1974); *Legislative History* at 4745-46.

Congressman John Dent, Chairman of the Subcommittee on Labor of the House Labor and Education Committee, sounded the same note:

> "Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to federal authority of the sole power to regulate the field for employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent state and local regulation . . . The conferees, *with the narrow exceptions specifically enumerated, applied this principle in its broadest sense* to foreclose any non-federal regulation of employee benefit plans. Thus, the provisions of Sec. 514 would reach any rule, regulation, practice or decision of any state, subdivision thereof, or any agency or instrumentality thereof — including any professional society or association operating under color of law — which would *affect* any employee benefit plan as described under Sec. 4(a) and not exempt under Sec. 4(b)." [Emphasis supplied.]

120 Cong. Rec. 29197 (August 20, 1974); *Legislative History* at 4670.

"Both House and Senate bills provided for preemption of state law, but — with one major exception appearing in the House bill — defined the perimeters of preemption in relation to the areas *regulated* by the bill. Such a formulation raised the possibility of endless litigation over the validity of state action that might impinge upon federal regulation, as well as opening the door to multiple and potentially conflicting state laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected with the federal regulatory scheme.

"Although the desirability of further regulation — at either the state or federal level — undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive federal interest and interest of uniformity with respect to interstate plans required — but for certain exceptions — the displacement of state action in the field of private employee benefit programs.

"The conferees — recognizing the dimensions of such a policy — also agreed to assign the Congressional Pension Task Force the responsibility of studying and evaluating preemption in connection with State authorities and reporting its findings to the Congress. If it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made."

120 Cong. Rec. 29942 (August 12, 1974); *Legislative History* at 4770-71.

The Board argues that ERISA does not preempt the right of the State to levy on CLVT assets because no portion of ERISA *explicitly* forbids such levies. This assertion ignores the pregnant fact that the framers of ERISA deliberately bypassed piecemeal preemption in favor of a statute which

would comprehensively preempt state interference with covered employee benefit plans. *See* discussion, *supra*. If the Board's position were accepted, only state laws explicitly mentioned in ERISA would be preempted. Such an absurd interpretation would ignore the comprehensive preemptive effect of Section 514(a).

Moreover, this Court has made it clear that preemption of state law need not be founded upon an explicit federal statute. "Preemption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or impiicitly contained in its structure and purpose.' " *Fidelity Federal Savings & Loan Assn. v. De La Cuesta*, ___ U.S. ___, 102 S.Ct. 3014, 3022 (1982), quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309 (1977).

In its brief, the Board stresses the strong interest of the State of California in securing an effective means for collection of tax revenues. The existence of such a strong state interest, however, will not ameliorate the preemptive effect of federal law: "These principles [preemption under the Supremacy Clause] are not inapplicable here simply because real property law is a matter of special concern to the States: 'The relative importance to the state of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.' " *Fidelity Federal Savings & Loan Assn. v. De La Cuesta*, ___ U.S. ___, 102 S.Ct. 3014, 3022 (1982) quoting *Free v. Bland*, 369 U.S. 663, 666, 82 S.Ct. 1089, 1092 (1962).

3. Recent Amendments to ERISA Affirm Congressional Intent to Broadly Preempt State Interference With the Operation of Federally Regulated Employee Benefit Plans.

On January 14, 1983, President Reagan signed P.L. 97-473 into law. The law adds a new paragraph to Section 514(b) of ERISA, 29 U.S.C. Section 1144(b). This pro-

vision exempts the Hawaii Prepaid Health Care Act from the broad preemptive scope of Section 514(a). However, the law also adds paragraph 514(b)(5)(B) to the preemption statute. This portion of the statute provides that:

> "Nothing in subparagraph (A) shall be construed to exempt from subsection (a) —
>
> (i) *Any State tax law relating to employee benefit plans* . . ." [Emphasis supplied.]

At the time this law was passed, the decision of the Ninth Circuit in this case had been "on the books" for a period of six months. Moreover, this Court had agreed to hear this appeal on December 13, 1982. If Congress had intended to send a signal to this Court, or the lower courts, that it disapproved of the broad reading given by the Ninth Circuit in this case to the general preemption clause of Section 514(a), it surely would have done so, since this statute concerns the very preemption provisions involved in this suit. Instead, Congress inserted *additional* language in the statute which seems designed to "keep the lid on" efforts to evade ERISA's broad preemptive reach.[23]

4. The California Garnishment Laws at Issue Directly Encroach Upon the Provisions of ERISA Regulating the Disbursal of Trust Monies.

Sections 403(c)(1) and 404(a)(1) of ERISA, quoted *supra*, restrict the disbursal of trust funds. Section 403(c)(1) is a portion of the statute requiring employee benefit plan assets to be held in trust; Section 404(a)(1) is a portion of the statute describing a fiduciary's obligations regarding the disposition of trust fund assets.

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[23]For a more extended discussion of the legislative history of the 1983 amendment to Section 514 of ERISA, *see* the amicus curiae brief filed by the AFL-CIO in this proceeding.

The obvious purpose of these provisions is to keep assets of an employee benefit plan from being disbursed to third parties except in limited and carefully controlled circumstances, thereby eliminating the possibility that such assets will be diverted from their intended use. Although ERISA permits benefits plan assets to be paid to persons other than trust beneficiaries in certain clearly defined instances, it contains no authorization permitting the Trustees to respond to levies and garnishments issued by local or state agencies.[24]

If these issues of policy are open (and we believe they are not) sound reasons exist for the application of the preemption doctrine in cases such as the present one.[25] Consider the following points.

1. The whole purpose of a "spendthrift" trust such as the CLVT is to create a pool of savings for each individual, to which he will only have access at a specified time. Thus,

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[24]The Board argues that nothing in ERISA explicitly forbids a state from applying sequestration remedies against an ERISA-regulated trust fund. This argument misses the point. As this Court held in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895 (1981), the states are not permitted to apply laws to such trusts in a manner which would narrow their federally sanctioned operations. The CLVT Trust Agreement provides that the CLVT's assets shall not be disbursed except to beneficiaries in a specifically prescribed fashion. This is consistent with the command of ERISA that the assets of such a trust "shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying resonable expenses of administering the plan." 29 U.S.C. Section 1103(c)(1). By attempting to apply a state law which would, in effect, mandate an exception to the provisions of the Trust Agreement and the command of ERISA, the state has encroached upon the operation of the CLVT in precisely the way this Court found to be forbidden in *Alessi*.

[25]The Board also argues that the CLVT is not entitled to claim the protection of the preemptive provisions of ERISA, because ERISA regulates pension plans more comprehensively than other types of employee benefit trusts. This argument overlooks the fact that each of the statutory provisions upon which the CLVT relies fall within the provisions of ERISA relating to *all* employee benefit plans. See ERISA, Section 514, 29 U.S.C. Section 1144; ERISA, Section 403(c)(1), 29 U.S.C. Section 1103(c)(1).

the Trust Agreement specifically precludes the hypothecation of trust fund assets (see Statement of Facts, *supra*). If creditors of beneficiaries of the CLVT, including the Board, can reach Trust assets through garnishment, the entire purpose of the Trust will be frustrated. "Spendthrift" trusts like the CLVT are well known at common law and have been recognized as permissible under the provisions of Section 302(c)(6) of the Labor Management Relations Act, 29 U.S.C. 186(c)(6). Their "spendthrift" terms are enforceable absent any clear design to defraud third parties. *See, e.g., United Mine Workers of America v. Boyle*, 418 F. Supp. 406, 408-410 (D.C.D.C. 1976), *aff'd*, 567 F.2d 112 (D.C. Cir. 1977), *cert. denied sub nom. Antal v. Boyle*, 435 U.S. 956, 98 S.Ct. 1589 (1978).

2. If such creditors know that they can reach Trust assets to satisfy their claims, the beneficiaries of the Trust will be able to do indirectly what they cannot do directly, *i.e.*, use Trust assets to satisfy debts and divert portions of their regular (non-Trust) income to other purposes. Beneficiaries who wish to obtain credit may over-extend themselves financially by telling finance companies, car dealers, and other sources of credit that their Trust benefits are a "backup" to their regular income.

3. The administrative expense of having to respond to garnishment notices and claims of judgment creditors on a continuous basis will significantly enlarge the cost of operating the Trust. This will shrink the amount of assets available for the beneficiaries.

4. Only workmen who are actually employed under the terms of a collective bargaining agreement have contributions made to the Trust for their benefit. These workmen are receiving wages, which are subject to garnishment in any event. There is no practical reason why the state cannot proceed, as it usually does, to attempt to garnish wages,

rather than attempt to reach assets of the Trust to which the employee is not yet entitled.

5. When the employee *does* receive his payment from the Trust (which occurs on an annual basis), the state can use the remedies at its disposal to levy on the funds in the employee's hands. This relieves the Trust of the administrative burden of responding to large numbers of Notices to Withhold and other types of garnishments and levies, and places the burden of dealing with such matters where it belongs, *i.e.*, on the employee, his employer, and his creditors.

A further reason for finding the application of state sequestration laws preempted appears in this Court's opinion in *Alessi v. Raybestos-Manhattan, Inc., supra.* Vacation trusts, like the pension plans considered in *Alessi*, are creatures of collective bargaining, which have long enjoyed sanction under federal law. *See* LMRA Section 302(c)(6), 29 U.S.C. Section 186(c)(6). Such trusts, which "emerge from collective bargaining" call forth "the traditional federal interest in precluding state interference with labor-management negotiations . . ." and "as a subject of collective bargaining, [their] terms themselves become expressions of federal law, requiring preemption of intrusive state law." *Alessi, supra*, 101 S.Ct. at 1907.

This court has repeatedly expressed its concern that state laws not be permitted to interfere in areas of paramount federal concern, even if they do not directly conflict with federal statutory provisions; *see, e.g., Teamsters v. Oliver*, 358 U.S. 283, 296, 79 S.Ct. 297, 304 (1959); *Amalgamated Assn. of Street, Electric R. and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909 (1971); *San Diego Building Trades Council v. Garmon*, 359 U.S. 326, 79 S.Ct. 773 (1959). After the passage of ERISA, there can

be no serious question that the regulation of employee benefit plans is such an area of paramount federal concern.

The Board relies heavily upon the decision in *National Bank of North America v. International Brotherhood, etc.*, 419 N.Y.S.2d 127, 69 A.D.2d 679 (1979), *appeal dismissed*, 48 N.Y.2d 752, 422 N.Y.S.2d 666 (1979), where an intermediate state court, one judge dissenting, permitted the garnishment of the proceeds of a pension trust regulated by ERISA.

The *National Bank of North America* case is clearly distinguishable from the present proceeding. In the first place, its holding that ERISA-regulated *pension funds* may be garnished under state law is clearly a minority view; see *General Motors Corp. v. Buha*, 623 F.2d 455 (6th Cir. 1980). Moreover, since the case concerns a pension fund, its entire focus is upon the special ERISA provision relating to the non-alienation of pension benefits, 29 U.S.C. § 1056(d) which is not involved in this proceeding. Furthermore, the *National Bank of North America* opinion was written prior to the issuance of the Advisory Opinion by the Department of Labor which underpins the CLVT's position in this case; the *National Bank of North America* opinion contains no discussion of the legal effect of § 403(c) and § 404(a)(1) of ERISA, or of the general preemption provisions, of § 514, which underlie the Department of Labor's opinion relating to the present case.

The Board also places strong reliance on *Stone v. Stone*, 450 F. Supp. 919 (N.D. Cal. 1978) *aff'd*, 632 F.2d 740 (9th Cir. 1980), *cert. denied* 453 U.S. 922 (1981) and its progeny, which have allowed state courts to order the division of benefits payable by pension plans governed by ERISA. With all respect, we believe this reliance is misplaced. The *Stone* decision, and many of the decisions which have followed it, have specifically emphasized that the re-

lationship between spouses and other members of the family unit is peculiarly a source of state concern and that "this factor distinguishes community property claims of nonemployee spouses from the claims of business creditors, who are not members of the family unit protected by ERISA." 450 F. Supp. at 926. Thus, the *Stone* court concludes that inter-spousal "community property interests [are to be treated] differently from other claims against benefits."

The pervasive interest of states in regulating family relations is not present in this case. All that is at stake here is an effort by a creditor (albeit a governmental entity) to satisfy a claim for delinquent taxes. Opening the door to such claims will necessarily expose ERISA-regulated trust funds to claims from general creditors who are not objects of special state concern.

Moreover, the fact that the *Stone* case involved principles of community property law, traditionally a matter of intimate state concern, was specifically noted by the court:

> "Regulation of benefit plans is an exercise of the police powers of states, but state regulation of benefit plans is not nearly as well established as state regulation of community property. To preclude state regulation of this latter area would involve a much more radical disturbance of 'the federal-state balance' 450 F. Supp. at 932, quoting *Jones v. Rath Packing Co.*, 430 U.S. 519 at 525, 97 S.Ct. 1305 at 1308."

Finally, State law itself exempts many types of employee benefits from attachment or garnishment. *See, e.g., Ogle v. Heim*, 69 Cal. 2d . . . (1968); *Miller v. Superior Court*, 69 Cal. 2d 14 (1968). There is nothing "unusual," therefore, about a federal law requiring such an exemption.

5. Deference Should Be Accorded to the Determination of the Department of Labor That ERISA Preempts State Garnishments.

As previously noted, the Department of Labor has issued an Advisory Opinion, holding that the preemption provisions of ERISA preclude the State of California and its instrumentalities from garnishing or levying upon assets held by the CLVT.

With the exception of tax matters and certain other specialized areas which are reserved to other departments, the Secretary of Labor is given general authority to issue regulations, investigate claims and initiate litigation to enforce the provisions of ERISA; *see* 29 U.S.C. Sections 1132(a), 1132(h), 1132(i), 1132(j), 1133, 1134(a), and 1135.

Though the Advisory Opinion of the Department of Labor is admittedly not a "legislative regulation," it is an interpretative determination, entitled to the measure of deference accorded such rulings. *Cf. Buczynski v. General Motors Corporation*, 616 F.2d 1238, 1242 (3rd Cir. 1980), *aff'd. sub nom. Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 1903, n.13 (1981). The Ninth Circuit's ruling is consistent with the Advisory Opinion of the Department of Labor, and with the language of ERISA's preemption provisions.

6. Application of Preemption Principles to This Case Is Consistent With Past Applications of the Preemption Doctrine by This Court.

This is not the first case in which this Court has been forced to consider whether paramount federal interests require the imposition of limitations upon state taxing power. For example, last term in *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, ___ U.S. ___, 102 S.Ct. 3394 (1982), this Court held that federal law preempted the right of the State of New Mexico to impose a gross

receipts tax upon revenues received by a non-Indian construction company for work performed on an Indian reservation. Similarly, in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578 (1980), this Court found that the federal government's comprehensive regulation of the harvesting and sale of timber owned by Indian tribes precluded state taxation of receipts of non-Indian logging and hauling companies employed to work on tribe-owned timberlands. This Court rejected the argument that the "general desire [of the state] to raise revenue outweighed the federal interests involved." See also *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685, 85 S.Ct. 1242 (1965).

This Court has recognized that in areas of pervasive federal control, a state law necessarily conflicts with the federal scheme if it limits rights which the federal scheme permits. For example, in *Fidelity Savings & Loan Assn. v. De La Cuesta*, ___ U.S. ___, 102 S.Ct. 3014, 3023 (1982) this Court invalidated the application of California law to preclude the right of federal savings and loan associations to insert "due-on-sale" clauses in mortgage instruments. Such clauses were permitted, but not required, by regulations issued by the Federal Home Loan Bank Board. This Court held that the California rule impermissibly encroached upon the federal regulatory scheme by limiting the options otherwise available under federal law. *Cf. Commonwealth of Pennsylvania v. Nelson*, 350 U.S. 497, 76 S.Ct. 477 (1956) [anti-sedition legislation preempted by Congress].

Similarly, in *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704 (1971) this Court invalidated a state statute which provided that financial liability for a damage judgment arising from an automobile accident would survive a discharge in bankruptcy. The Court found that the federal interest in providing "a new opportunity in life and a clear field for

future effort, unhampered by the pressure and discouragement of preexisting debt," embodied in federal bankruptcy laws, outweighed the state interest in "providing leverage for the collection of damages from drivers who either admit that they are at fault or are adjudged negligent." 402 U.S. at 646, 91 S.Ct. at 1710.

The present case involves an apparent conflict between a state's desire to raise revenue and two areas of paramount federal interest and control: (1) The collective bargaining process and the agreements, including Trust Fund agreements, which are products thereof; and (2) the regulation of employee welfare benefit plans, to insure their continued financial stability.

In weighing the state and federal interests, it is clear that the federal interests must prevail. *Cf. Franklin National Bank v. New York*, 347 U.S. 373, 378, 74 S.Ct. 550, 553 (1954) where this Court found a "clear conflict" to exist between federal laws authorizing national banks to receive savings deposits, but not specifically permitting or requiring them to advertise such services, and a New York law, which forbade them from using the word "savings" in their advertising.

C. There Is No Merit in Appellant's Contention That the Application of ERISA's Preemption Provisions Violates the Tenth Amendment to the U.S. Constitution.

1. The Constitutional Issue Was Not Raised Below and Should Not Be Considered by This Court.

As Appellees have already noted in their opposition to the Jurisdictional Statement, the Board has elected, for the first time, to argue before this Court that the application of §514 of ERISA to preclude the Board from levying upon CLVT assets would impermissibly encroach upon rights

preserved to the states, in contravention of the Tenth Amendment to the U.S. Constitution. We have also noted the consistent line of cases from this Court in which the Court has refused to consider constitutional claims which were not addressed in the court below, and on which no factual record has been made. *See, e.g., Youngberg v. Romeo*, ___ U.S. ___, ___ n.19, 102 S.Ct. 2452, 2457, n.19 (1982); *United States v. Lovasco*, 431 U.S. 783, 788, n.7, 97 S.Ct. 2044, 2048, n.7 (1977).

There are no facts in the present record, and nothing presented to the courts below, which would indicate that the revenue raising powers of the State of California are impaired in any significant way by the limitation on the garnishment rights of the Board compelled by § 514 of ERISA. The State has not presented proof, and has made no serious claim, that any significant loss of revenues has occurred because of its inability to levy on the assets of the CLVT and similarly situated trust funds. Indeed, it should be quite apparent that the State has many alternative resources available to it to satisfy its need for revenue. The statutes on which the Board relies in this case can be successfully employed to levy on bank accounts, escrow accounts, and any other non-ERISA regulated reservoirs of taxpayer's assets available in the State of California. Since, by definition, all of the laborers who are accumulating vacation benefits are necessarily employed, it would be a simple matter for the State to simply garnish their wages. Moreover, the State can immediately seize the payments made to the individual laborers as soon as they are disbursed by the CLVT, without disrupting the CLVT's operations.

If the Board's argument were taken seriously, any "impairment" of the State of California's ability to raise revenue

by any conceivable means, no matter how slight, would be unconstitutional. No decision of this Court supports such an absurd proposition.

2. This Court's Decision in *National League of Cities v. Usery* Does Not Support the Board's Constitutional Claim.

Appellant argues that the Tenth Amendment state sovereignty doctrine discussed in *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465 (1976), prevents Congress from protecting ERISA-based employee vacation savings trusts from garnishment for income taxes owed by trust beneficiaries. In doing so, Appellant asks this Court to extend the *Usery* precedent far beyond the limits implied by the facts of the *Usery* case. This Court has recently indicated that the holding in *Usery* is not a broad condemnation of any legislation which may "touch" areas of state concern. See *E.E.O.C. v. State of Wyoming*, ___ U.S. ___, ___ S.Ct. ___, 51 U.S.L.W. 4219 (March 5, 1983).

The Board's reliance on *Usery* seems particularly puzzling in light of *Hodel v. Va. Surface Min. and Reclam. Assn.* ___ U.S. ___, 101 S.Ct. 2352 (1981). In *Hodel*, the Court set forth three prerequisites to success in an action based upon the holding in *Usery*:

> "It should be apparent from this discussion that in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the '*States* as *States*.' *Id.*, at 854, 96 S.Ct. at 2475. Second, the federal regulation must address matters that are indisputably '*attributes* of state sovereignty.' *Id.*, at 845, 96 S.Ct., at 2471. And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas

of traditional functions.' *Id.*, at 852, 96 S.Ct. at 2472." 101 S.Ct., at 2366.

The Board's Tenth Amendment claim satisfies none of these requirements. First, Appellant has not, and cannot, show "that the challenged statute regulates the 'States as States'." *Id.* Unlike *Usery*, this is not a case dealing with federal legislation explicitly regulating the terms of employment between local governments and their employees. 426 U.S. at 836, 96 S.Ct. at 2467. The provisions of ERISA at issue herein do not purport to regulate the states at all. Rather, they regulate the disbursement of monies from employee benefit trusts. See 29 U.S.C. § 1103(c)(1), 29 U.S.C. § 1104(a)(1). Any impact on the states' ability to garnish, attach, or otherwise execute against trust funds is merely incidental to the primary purpose of assuring that trust assets will be used solely for trust purposes.

Applying the second part of the *Hodel* test, it is clear that the regulation at issue herein does not "address matters that are indisputably 'attributes of state sovereignty.' " *Hodel* at 2366 quoting *Usery* at 2471. The states' power to tax may be an attribute of state sovereignty, but the power to collect debts by garnishment is not. The power to garnish is an attribute of creditor status, not an attribute of state sovereignty. *Cf. e.g.*, California Code of Civil Procedure § 708.210, *et seq.* (judgment creditor's garnishment rights) *with* California Revenue and Taxation Code § 18817 (Franchise Tax Board's garnishment rights). In creating tax liability, the state acts as sovereign. In collecting, the state acts as creditor. Federal legislation protecting ERISA-based spendthrift trusts such as the CLVT, from garnishment by their beneficiaries' creditors, addresses matters of creditors' rights, not state sovereignty.

The Board has also failed to make a sufficient showing to satisfy the third requirement set forth in *Hodel*. It has not

shown that preventing states from garnishing ERISA-based vacation trusts like the CLVT "would directly impair their ability 'to structure integral operations in areas of traditional functions.' " The *Usery* opinion emphasizes the fact that, by directly regulating the wages paid public employees, Congress displaced state decision-making authority concerning the internal affairs of local governments. 426 U.S. at 847, 849, 851 and 855, 96 S.Ct. at 2472, 2473, 2474 and 2476.

> "Congress may not exercise that [*i.e.*, the commerce clause] power so as to force directly upon the states its choices as to how essential decisions regarding the conduct of integral government functions are to be made." 426 U.S. at 855, 96 S.Ct. at 2476.

Even if the three tests set forth in *Usery* are met, legislation may still be sustained where "the nature of the federal interest advanced may be such that it justifies state submission." *E.E.O.C. v. State of Wyoming*, ___ U.S. ___, ___ S.Ct. ___, 51 U.S.L.W. 4219 (March 5, 1983), quoting *Hodel, supra*, 452 U.S. at 288, n.29.

In contrast to *Usery*, this case does not involve Congress' displacing local decisions concerning the internal management of local government. Rather, this case involves Congress' prevention of diversion to state coffers of funds held in federally regulated spendthrift trusts not established to benefit the states. No threat of direct impairment of the states' ability to structure integral operations in areas of traditional functions appears in this case.

The *Usery* decision rests on a factual record detailing the "forced relinquishment of important governmental activities" that would have resulted from the challenged legislation. *Id.* at 847, 96 S.Ct. at 2472. Leading constitutional scholars have recognized and applauded the emphasis the

Usery opinion places upon "the state's role of providing for the interests of its citizens in receiving important social services." Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 Yale L.J. 1165, 1172 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 Harv. L.Rev. 1065 (1977).

In this case, unlike *Usery*, Appellant has failed to allege or prove a single fact to show that the challenged regulation threatens to diminish the level of essential governmental services the state provides.

Conclusion.

For the reasons stated herein, the decision of the U.S. Court of Appeals for the Ninth Circuit should be affirmed.

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IN THE

Supreme Court of the United States

October Term, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

REPLY BRIEF.

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14 Wright & Miller, Federal Practice and Procedure, Sec. 3722 (1982) Supp. p. 209 6

No. 82-695

IN THE

Supreme Court of the United States

October Term, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,

Appellees.

REPLY BRIEF.

ARGUMENT.

I.

THIS CASE DID NOT ARISE UNDER FEDERAL LAW; THEREFORE THE DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION.

The Franchise Tax Board of the State of California (the Board) originally filed this action, which was authorized solely by California law in the Superior Court of the State of California for the County of Los Angeles. Construction Laborers Vacation Trust and its Trustees (CLVT) filed a Petition for Removal of the action to District Court. The action was removed.

Generally an action may only be removed from state court to federal court if the federal court would have had original jurisdiction over the matter had it been brought there initially. (*Arkansas v. Kansas & Texas Coal Co.* (1901) 183 U.S. 185, 189; *First Nat. Bank of Aberdeen v. Aberdeen Nat. Bank* (8th Cir. 1980) 627 F.2d 843, 848. Removal of the present case was proper then, only if the Board's causes of action arose under Federal law and the Board could have originally brought this suit in District Court.

There is no authority under the Employment Retirement Income Security Act of 1974 (ERISA) for the Board to bring an action in federal court. Moreover, the Board relied solely on state law.

Certain guidelines have been established by this Court for almost 100 years which determine whether a case "arises under" federal law. In order for CLVT to prevail in this case, these principles would necessarily have to be abrogated. These principles are as follows:

1. The right created by federal law must be an essential element of plaintiff's cause of action and this federal claim must appear on the face of the "well-pleaded complaint" unaided by the answer or petition for removal. *Phillips Petroleum Co. v. Texaco, Inc.* (1974) 415 U.S. 125, 127-28; *Pan Am. Corp. v. Superior Court* (1961) 366 U.S. 656, 663; *Skelly Oil Co. v. Phillips Co.* (1950) 339 U.S. 667, 672; *Gully v. First Nat. Bank* (1936) 299 U.S. 109, 112-113; *The Fair v. Kohler Die Co.* (1913) 228 U.S. 22, 25; *Louisville & Nashville R.R. v. Mottley* (1908) 211 U.S. 149, 152; *Tennessee v. Union and Planters' Bank* (1894) 152 U.S. 454, 461-62.

2. The plaintiff must be contending that a federally created rule or law creates his cause of action. *Bell v. Hood* (1946) 327 U.S. 678; *The Fair v. Kohler Die Co., supra*, 228 U.S. at 24-25; *Swafford v. Templeton* (1902) 185 U.S. 487, 494.

3. The complaint itself will not serve as a basis of jurisdiction insofar as it goes beyond a statement of plaintiff's cause of action and anticipates or replies to a probable defense. *Phillips Petroleum Co. v. Texaco, Inc., supra*, 415 U.S. at 128. *Gully v. First Nat. Bank, supra*, 299 U.S. at 113; *Skelly Oil Co., supra*, 339 U.S. at 672; *The Fair v. Kohler Die Co., supra*, 228 U.S. at 25; *Louisville & Nashville R.R. v. Mottley, supra*, 211 U.S. at 152; *Arkansas v. Kansas & Texas Coal Co.* (1901) 183 U.S. 185, 189; *Tennessee v. Union and Planters' Bank, supra*, 152 U.S. at 464.

4. The party who brings a suit is master to decide what law he will rely on. *Pan Am Corp. v. Superior Court, supra*, 366 U.S. 656 at 662; *The Fair v. Kohler Die Co., supra*, 228 U.S.

at 25, and the plaintiff determines whether he brings a suit "arising under" the laws of the U.S. (*Id.*)

5. "If the plaintiff decides not to invoke a federal right, his claim belongs in a state court." (*Pan Am. Corp. v. Superior Court, supra*, 366 U.S. at 663.)

The Board's causes of action are based solely on State law. It is not necessary to construe a federal statute in order for the Board to recover under its Notice To Withhold. Construction of a federal statute is only relevant to CLVT's defense. Where a plaintiff has predicated his suit upon rights created by state law, the fact that federal regulations or law may create a defense and these federal regulations or law may have to be interpreted in connection with that defense, does not create federal jurisdiction. (*Madsen v. Prudential Federal Sav. & Loan Ass'n.* (10th Cir. 1981) 635 F.2d 797, 801, cert. denied (1981) 451 U.S. 1018.)

In spite of the holdings of this Court that a federal defense does not create subject matter jurisdiction, CLVT argues that the specific defense of preemption can create jurisdiction. (Brief, pp. 16-17.) However, it is clear that federal preemption is merely a defense to state law claims and thus forms no independent basis for jurisdiction. *Michigan Sav. & Loan League v. Francis* (6th Cir. 1982) 683 F.2d 957, 960; *People of State of Ill. v. Kerr-McGee Chem. Corp.* (7th Cir. 1982) 677 F.2d 571, 577, cert. denied (1982) 103 S.Ct. 469; *First Nat. Bank of Aberdeen v. Aberdeen Nat. Bank* (8th Cir. 1980) 627 F.2d 843, 853; *Home Federal S & L Ass'n. v. Ins. Dept. of Iowa* (8th Cir. 1978) 571 F.2d 423, 426; *Alton Box Bd. Co. v. Esprit De Corp.* (9th Cir. 1982) 682 F.2d 1267, 1270; *Miller-Wohl Co. v. Com'r of Labor & Industry* (9th Cir. 1982) 685 F.2d 1088, 1090; *Guinasso v. Pacific First Fed. Sav. & Loan Ass'n* (9th Cir. 1981) 656 F.2d 1364, 1367, cert. denied (1982) 455 U.S. 1020.[1] *State of Wash-*

[1]CLVT discusses selective portions of the *Guinasso* opinion which it mistakenly believes supports its arguments. A full reading of the *Guinasso* opinion, however, indicates that it is totally supportive of the Board's position. For example, the *Guinasso* court states:

> "A substantial proposition of federal law must form a 'direct and essential ingredient of the plaintiff's cause of action.' (Citation)" *Guinasso v. Pacific First Fed. Sav. & Loan Ass'n., supra*, 656 F.2d at 1366.

The Court further states "But when the claim presents a prima facie basis for relief entirely under state law, the preemption defense does not support federal jurisdiction." (*Id.* at 1367.)

ington v. American League of Prof. Base. Clubs (9th Cir. 1972) 460 F.2d 654, 660; *Madsen v. Prudential Federal Sav. & Loan Ass'n.* (10th Cir. 1981) 635 F.2d 797, 801. (*See Gully v. First Nat. Bank, supra*, 299 U.S. at 112-18; *Pan Am. Corp. v. Superior Court, supra*, 366 U.S. at 662-65.

This principle is consistent with the general principles of federal question jurisdiction and it follows the holding of this Court in *Gully v. First Nat. Bank, supra*, 299 U.S. 109.

In fact, the 8th Circuit in *First Nat. Bank of Aberdeen v. Aberdeen Nat. Bank* (8th Cir. 1980) 627 F.2d 843 stated that this issue has already been decided in the *Gully* case. Quoting the following passage from *Gully*: "By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby," the 8th Circuit concludes as follows: "These quoted passages clearly suggest that the Gully court believed a defensive assertion of preemption did not give rise to federal question jursidiction." (*Id.* at 852.)

The Board has thus demonstrated that this action, based on state law, filed by the Board in state court, should not have been removed to District Court. Since CLVT cannot establish subject matter jurisdiction on the basis of what actually happened, CLVT begins its discussion of jurisdiction by arguing that this case should be decided on the basis of what *might* have happened. (Brief, p. 8.) CLVT obviously wishes that it had been the plaintiff rather than the defendant in this case.

However, no matter how much CLVT wishes it could have brought this action in District Court, the fact is that the Board brought this action in state court and relied only on State law as a basis for its recovery.

In addition, it is clear that any action CLVT would have tried to bring in District Court would have been barred by 28 U.S.C. 1341 which provides that "[T]he district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may

be had in the courts of such state." CLVT had an adequate remedy at State law because it could have asserted its argument of preemption in the State court action which the Board had already filed. *Kohn v. Central Distributing Co.* (1939) 306 U.S. 531, 533. See Hart & Wechsler, The Federal Courts & The Federal System, Second Edition (1973) p. 978. Finally, even if CLVT had been the plaintiff and brought a case for declaratory relief in District Court premised on alleged presumption, there is ample authority in the cases previously discussed that the case would not have arisen under federal law.

This Court's holding is *Public Serv. Comm'n v. Wycoff, Co.* (1952) 344 U.S. 237 is also instructive in this regard. In *Wycoff*, this Court stated as follows:

> "Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. . . . Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law." *Id.* at 248

By its declaratory relief action, CLVT would be seeking a declaration that it had a good defense to the action of the Franchise Tax Board. However, it is the character of the threatened action and not the defense that determines whether there is federal question jurisdiction. Since the Board's threatened or real action arose only under State law, this would not create federal question jurisdiction.

CLVT next argues that even though the Board was the plaintiff rather than the defendant, and that CLVT filed a Motion To Dismiss rather than an answer or counterclaim, we should pretend that CLVT filed an answer or a counterclaim although the facts show this did not actually happen. (Brief, p. 10.)

Even if CLVT had filed a counterclaim, it is clear that removability cannot be created by defendant pleading a counterclaim presenting a federal question under 28 U.S.C. § 1331. *Rath Packing Co. v. Becker* (9th Cir. 1975) 530 F.2d 1295, 1303, *aff'd on other grounds sub nom. Jones v. Rath Packing Co.*

(1977) 430 U.S. 519; 14 Wright & Miller, Federal Practice and Procedure, § 3722 (1982) Supp. p. 209.

State courts are competent to decide any questions of federal law which arise in this case. As this court stated in *Arkansas v. Kansas & Texas Coal Co.* (1901) 183 U.S. 185, 190-91, "When Federal questions arise in cases pending in the state courts, those courts are competent, and it is their duty, to decide them." In *Pan Am. Corp. v. Superior Court, supra*, 366 U.S. 656, this court stated:

> "Apart from other considerations that dispel such fears, it should be remembered that the route to review by this Court is open to parties aggrieved by adverse state-court decisions of federal questions." (*Id.* at 665.)

It is clear that there is no right created by federal law which is an essential element of the Board's causes of action. Application of the above stated principles to the case at bar compels the conclusion that this case should not have been removed to the District Court as it did not "arise under" federal law.

II.

CALIFORNIA REVENUE & TAXATION CODE SECTION 18817 HAS NOT BEEN PREEMPTED BY ERISA SECTION 514.

CLVT contends that California's tax levy statute is preempted by ERISA section 514 insofar as the State statute is used to levy on a vacation fund to collect the delinquent taxes of a participant or beneficiary of that fund.

At the outset, it should be emphasized that the statute which is the target of possible preemption is a State tax collection statute. Furthermore, this case concerns the Board's levy on a *vacation* fund only. The Board has not attempted to levy on a *pension* fund. In addition, the Board has not assessed a tax *on* the vacation fund itself. Rather, the fund is merely a tax collection source.[2]

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[2]This fact distinguishes this case from *National Carriers' Conf. Com. v. Heffernan* (D.Conn. 1978) 454 Fed. Supp. 914 where the State attempted to specifically tax the benefits paid by a welfare plan. Moreover, the court noted that the preempted statute was "not merely a general taxing provision that catches employee benefit plans within its wide sweep. On the contrary, the tax [was] specifically directed at such plans exclusively, . . ." (*Id.* at 915.)

It is apparent that Congress did not intend for taxpayers covered under ERISA plans to finance their annual vacation before they pay their taxes. Furthermore, if CLVT and the delinquent taxpayers are now able to shield vacation pay from a legitimate tax levy under the authority of ERISA, this could create serious possibilities of tax avoidance in the future. For example, if CLVT prevails in this case, what is to prevent the next trust agreement from providing that half of a worker's salary shall be deposited in an ERISA vacation trust and that the salary will not be subject to State income tax of any kind? Surely, Congress did not intend such a result, yet that is the logical extension of a holding that an ERISA plan can shield certain funds from levy.

It is a serious step to preempt a state statute, especially a statute dealing with the collection of taxes, one of the traditional police powers of the State. As this Court has stated, the "exercise of federal supremacy is not lightly to be presumed." (*Alessi v. Rabestos-Manhattan, Inc.* (1981) 451 U.S. 504, 522, quoting *New York State Dept. of Soc. Services v. Dublino* (1973) 413 U.S. 405, 413. In addition, since this is a field which has traditionally been occupied by the States, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (*Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230; Accord *Jones v. Rath Packing Co.*, (1977) 430 U.S. 519, 525.)

It is clear that the State of California has a vital public interest in collecting its revenue. Thus, a tax collection statute must be accorded a high presumption of validity. As this Court stated in *Kelly v. Washington* (1937) 302 U.S. 1, 14, "When the State is seeking to protect a vital interest, we have always been slow to find that the enaction of Congress has shorn the State of the power which it would otherwise possess."

It is equally true that "The exercise by the State of its police power, which would be valid if not superseded by federal action, is superseded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' " (Citations) *Id.* at 10.

In the case of *Hines v. Davidowitz* (1940) 313 U.S. 52, this Court stated:

> "Any concurrent state power [over alien registration] that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax." (312 U.S. at 68.)

In determining whether Congress has clearly manifested that Revenue and Taxation Code section 18817 must be preempted, it is necessary to examine ERISA in general and specifically section 514.

A. Revenue and Taxation Code Section 18817 Does Not Relate to nor Regulate the Terms and Conditions of a Vacation Plan.

An examination of possible preemption under ERISA section 514 must begin with an analysis of section 514 itself.

The Franchise Tax Board contends that ERISA's preemption section is not limitless especially when it infringes on the sovereign power of the State of California to assess and collect delinquent taxes. It is only necessary to review this Court's decision in *Alessi v. Raybestos-Manhattan, Inc.* (1981) 451 U.S. 504 to see that section 514 does not preempt *all* State laws with the most tangential relationship to ERISA. Otherwise, this Court would not have reserved for future cases the question of the "outer bounds" of ERISA's preemptive language. *Id.* at 525.

ERISA section 514(a) provides that "State" laws which "relate" to any employee benefit plan are superseded. ERISA section 514(c)(2) defines the term "State" to include a State "which purports to *regulate*, directly or indirectly, the *terms* and *conditions* of employee benefit plans covered by Title 1." (Emphasis added.)

Thus not *all* State laws are preempted, but only those laws that "relate" to ERISA. Preemption is further narrowed by the words of the statute which define a "State" as a State which "regulates" the "terms and conditions" of a covered plan. It must be assumed that the language of the statute regarding the "regulation" of the "terms and conditions" of the plan is not surplusage and that Congress chose it intentionally.

States are not prevented by this language from tangentially affecting all ERISA plans. Invalidation of all state legislation incidentally affecting ERISA plans would be far broader than the words Congress chose would support. For example, a building owned by an ERISA plan is surely subject to state laws regarding property taxes, fire and safety laws and similar matters historically regulated by the states, even though the state laws, when applied to a building owned by an ERISA plan, clearly tangentially affect the ERISA plan.

It is apparent that Revenue and Taxation Code section 18817 does not directly or indirectly regulate the terms or conditions of CLVT's vacation plan. The Plan continues to exist in its original form and Revenue and Taxation Code section 18817 merely allows the State to levy on funds that will eventually be paid to an individual participant. Furthermore, the State statute does not interfere with the purposes of ERISA, as will be discussed *infra*.

Contrary to the assertion by the Department of Labor (DOL), California's tax levy statute is not analogous to the state laws preempted in *Alessi, supra*, 451 U.S. 504 and *Kramarsky v. Delta Airlines, Inc.* (2nd Cir. 1981) 666 F.2d 21, appeal pending, No. 81-1578 (argued January 10, 1983). In *Alessi*, the State statute explicitly referred to pensions and disallowed an offset of worker's compensation payments against the pension payment. Thus, the State statute determined how the benefit would be calculated. In *Kramarsky*, the State statute required that employee benefit plans provide coverage for disability due to pregnancy on the same basis as other disabling conditions and that employers provide at least eight weeks of coverage for pregnancy-related disability. Thus, the statute mandated the terms and conditions of the plan.

The Board's levy statute, by contrast, does not focus specifically on pension or welfare plans. Furthermore, it does not mandate the terms or conditions of any plan and it does not interfere with the purposes of ERISA.

B. Revenue and Taxation Code Section 18817 Does Not Interfere With the Purposes of ERISA.

Congress did not intend to preempt all State laws with even an incidental connection to ERISA. It is more reasonable to assume that Congress only meant to preempt laws which interfered

with the purposes and coverage of ERISA. To require a vacation plan to honor a tax levy of the State of California does not interfere with the purposes of ERISA. Furthermore, there is nothing in ERISA's legislative history which indicates a "clear and manifest purpose" (*Jones v. Rath Packing Co., supra*, 430 U.S. 519, 528; to prohibit California from collecting a participant's delinquent taxes from a vacation fund.

ERISA is a comprehensive statute "which Congress adopted after careful study of private retirement pension plans." (*Alessi v. Raybestos-Manhattan, Inc.* (1980) 451 U.S. 504, 510). Congress wanted to ensure through ERISA that a worker actually received the retirement benefits he had earned. (*Alessi, supra*, 451 U.S. at 510).

ERISA was enacted in response to various findings by Congress that private pension plans were not properly funded, were mismanaged and promised benefits which were never paid. (House Rep. No. 93-533, 93rd Cong., 2d Sess. (1974) U.S. Code Cong. & Admin. News, p. 4639 *et seq.*) One three year congressional study of private pensions "clearly established that too many workers, rather than being able to retire in dignity and security after a lifetime of labor rendered on the promise of a future pension, find that their earned expectations are not to be realized." Statement by the Honorable Harrison A. Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare, 93rd Cong., 2d Sess (1974) U.S. Code Cong. & Admin. News, at p. 5177.

The basic purpose of ERISA is to protect the literally millions of people who depend on benefits from private pension plans for financial independence after retirement. (H. Rep. No. 93-533, 93d Cong., 2d Sess. (1974) U.S. Code Cong. & Admin. News, p. 4639, 4640-4641; S. Rep. No. 93-127, 93d Cong. 2d Sess., (1974) U.S. Code Cong. & Admin. News, pp. 4838, 4839-4840.)

ERISA made major reforms in the area of pension regulation. To a lesser degree, it provided protection for welfare plans.

A review of ERISA indicates that with regard to pension plans, Congress provided that workers would have reasonable participation and vesting rights, the plans would be adequately funded, that trustees would be held to high fiduciary standards, and that workers would have remedies if these provisions were not carried

out. Workers in welfare plans were given protection in the area of fiduciary responsibility, reporting and disclosure and they were given remedies to enforce these provisions.

There is nothing in ERISA to suggest that Congress meant to insulate vacation plans from Revenue and Taxation Code section 18817, a tax levy statute of general application. In this connection, it is important to note that with regard to pension plans, Congress specifically prohibited the alienation of funds. (ERISA § 206(d).) There is *no* provision of ERISA which prohibits the alienation of welfare benefits. Since Congress specifically protected pension plans from alienation but did not extend the same protection to welfare plans, this is further evidence that Congress did not intend to shield welfare plans from alienation, especially by a taxing agency.

Revenue and Taxation Code § 18817 is a statute of general application which does not mention or regulate vacation plans. It is purely a tax collection statute which serves the important public purpose of collecting revenue to fund the essential operations of the State of California. With regard to welfare plans, the purposes of ERISA are to assure that participants receive pertinent information about the plans and that the fiduciaries are held to a high level of responsibility. Revenue and Taxation Code section 18817 has no direct or indirect effect on these purposes of ERISA. It is clear that Congress can achieve its objectives with regard to welfare plans without controlling the collection of revenue by the State of California.

C. Exceptions to ERISA's Preemption Have Been Found for High Public Purposes. The Collection of Revenue Serves a High Public Purpose.

The admission by CLVT that there is an exception in ERISA section 514(a) which allows ex-spouses and children to levy on welfare funds *and* the more highly regulated pension funds is fatal to its assertion that section 514(a) preempts *all* state laws. Obviously, as most courts have found, Congress did not intend to preempt State domestic relations laws and thus section 514(a) cannot be as broad as CLVT contends.

It is not a sufficient response for CLVT to argue that ERISA does not preempt domestic relations laws because ERISA was formulated to protect families of workers. If section 514(a) were as broad as CLVT argues, there could be no exception.

III.

THE POWER TO ASSESS AND COLLECT THE TAX IS ESSENTIAL TO THE STATE OF CALIFORNIA.

CLVT argues that the State of California would suffer no significant loss of revenue if it were not allowed to levy on the vacation fund. (Brief, p. 36.) This is not accurate since there are over 400,000 workers in California covered by vacation plans. More importantly, it is absurd to suggest that CLVT, or anyone else, may or may not interfere with the power of a State to collect its revenue depending on the amount at issue in one case.

IV.

THE AMENDMENT TO ERISA SECTION 514 MUST BE INTERPRETED BY REFERENCE TO THE AGSALUD DECISION.

As CLVT and others point out, section 514 of ERISA has recently been amended in direct response to this Court's affirmance of the Ninth Circuit's decision in *Standard Oil Co. of California v. Agsalud* (N.D. Cal. 1977) 442 F.Supp. 695, affirmed (9th Cir. 1980) 633 F.2d 760, affirmed (1981) 454 U.S. 801.

In the *Agsalud* case, the State of Hawaii attempted to require employers to provide their employees with a prepaid health care plan and to pay one-half of the premiums. Hawaii made several arguments as to why its law was not preempted by ERISA. One of these arguments was that the statute was an exercise of Hawaii's power to tax because it required the employers to pay half the insurance premiums of their employees. The Ninth Circuit did not agree with any of Hawaii's arguments and found the statute to be preempted.

As a result of this decision, ERISA section 514 was amended to exempt Hawaii's health benefit statute from preemption under section 514(a).

CLVT points to this amendment as evidencing Congress' intent to specifically preempt State tax laws. This interpretation, however, ignores the context in which the amendment arose. As the

reported decision indicates, Hawaii was arguing that the statute was an exercise of its *taxing* power since it was requiring a contribution from these employers. 442 F.Supp. at 710.

CLVT has cited no legislative history that Congress was concerned with the general tax collection laws of the States. The legislative history does indicate that the amendment was enacted to respond to the *Agsalud* decision. The amendment must be interpreted within the context of that case and the issues raised therein. Thus, it is logical to find that the amendment was designed to prohibit Hawaii or any other State from imposing a tax on employers to pay insurance premiums or benefits and to prohibit the States from taxing the ERISA fund itself. This interpretation corresponds to the context of the *Agsalud* case and the explanation of Senator Robert Dole, Chairman of the Finance Committee, who stated as follows:

> "The bill amends ERISA to provide that Hawaii law relating to employer maintained health insurance plans would not be preempted by ERISA to the extent that the Hawaiian law does not relate to matters thoroughly regulated under ERISA or impose tax liability on insurance premiums or benefits." [128 Cong. Rec. § 13151 (daily ed., October 1, 1982).]

Given the context of the *Agsalud* case and the remarks of Senator Dole, it is clear that Congress did not intend to preempt State tax collection laws which do not tax employers or ERISA benefits.

V.

THE BOARD MUST BE ALLOWED TO USE ITS CUMULATIVE TAX COLLECTION REMEDIES WITH REGARD TO THE CONSTRUCTION LABORERS. THE WAGE GARNISHMENT REMEDY ALONE IS NOT ADEQUATE.

CLVT argues that since the Board could levy on the wages of the construction laborers, it should be precluded from levying on the vacation fund. (Brief, p. 29.)

It is true that the Board has several alternative methods by which it may effect collection. However, the methods are *cumulative* and may be used in combination with or separate from each other. (Rev. and Tax. Code § 18931.) As in the instant case, a Notice To Withhold may be issued. (Rev. and Tax. Code

§§ 18817-18819.) There is no authority which holds that a taxing agency must use one remedy to the exclusion of another.

In addition, with regard to delinquent taxpayers in the construction industry, the wage garnishment procedure is most often ineffective as a collection mechanism. The reason for this is the same as the reason vacation funds are established; that is, individuals in the construction industry frequently work for several employers for short periods during a year. Furthermore, these individuals are often between jobs and thus receiving no wages.[3] By the time the Board discovers that a company has employed the tax debtor, through employer returns which have been filed with the State, the tax debtor often has completed the job with the company and moved on to other employment. Consequently, the Board is usually one step, or more, behind the tax debtor. However, wage garnishments returned by previous employers often indicate the tax debtor's occupation and/or union affiliation. This information is used to determine if an Order To Withhold should be issued to a vacation plan.

If the Board determines that an Order To Withhold should be issued to a vacation plan, the Board attempts to accommodate the administrators of the plan by issuing the Orders To Withhold only during periods reasonably close to the dates the contributions become payable.

Thus, the vacation fund as well as the wages of the workers should be available to satisfy tax liabilities.

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[3]This seasonal, transitory nature of the construction industry has been discussed by Congress, the courts and the Department of Labor.

In the legislative history of the Labor-Management Reporting and Disclosure Act of 1959, it states that:

> "The occasional nature of the employment relationship makes this industry [the building and construction industry] markedly different from manufacturing and other types of enterprise. An individual employee typically works for many employers and for none of them continuously. Jobs are frequently of short duration, depending upon various stages of construction."

S. Rep. No. 187, 86th Cong., 1st Sess. (1959), in U.S. Code Cong. & Admin. News, pp. 2318, 2344.

VI.
THE DEPARTMENT OF LABOR RULING IS INCORRECT.

CLVT relies on the December 28, 1979 opinion of the United States Department of Labor ("DOL") that the vacation trust is exempt from the Board's levy.[4]

The Board contends that the DOL opinion is of no assistance in deciding the issues before this Court. The DOL opinion cites one section of the subject vacation trust agreement (the non-alienation section), two sections of ERISA dealing with the assets and fiduciaries of ERISA plans, and the so-called preemption section. The DOL opinion letter then concludes, without any analysis, that the Board is preempted from levying on the vacation trust.

The DOL opinion first relies on section 9.08 of the trust instrument which is the non-alienation section. Section 9.08 is an attempt to create a spendthrift trust and, as the Board will discuss, *infra*, a taxpayer cannot create his own spendthrift trust and exempt it from the levy of a taxing agency.

The Department of Labor then refers to ERISA Sections 403(c)(1), 29 U.S.C. § 1103(c)(1) and 404(a)(1), 29 U.S.C. § 1104(a)(1), but does not discuss their application to the issue at hand.

The Board contends that these sections of ERISA was meant to protect beneficiaries from fiduciaries who might mismanage their trust funds. (*See*, e.g., 1974 U.S. Code Cong. & Admin. News, pp. 4645, 4847, 5075 et seq.) The sections were not intended to insulate taxpayers from their creditors, especially a taxing agency which is not an ordinary creditor.

The Department of Labor opinion then cites ERISA section 514(a), 29 U.S.C. § 1144(a) which it states established a broad preemption of all state laws insofar as they may relate to any

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[4]The District Court did not follow the advisory opinion of the DOL and did find that it "exceeds the scope of ERISA, is not reasonably necessary to effectuate the purpose of ERISA and is inconsistent with the congressional policy underlying ERISA". The District Court, however, did not find that the advisory opinion is clearly erroneous, unreasonable, arbitrary and capricious and the language to the contrary in the Jurisdictional Statement is the result of an error in the printing.

employee benefit plan covered by Title I of ERISA. Then without analysis and without any discussion regarding the difference between a welfare plan and a pension plan, the DOL concludes that the state may not levy on benefits of the Plan (the vacation trust). The DOL opinion never states *why* the state may not levy.

It must be noted that the Department of Labor admits that the Internal Revenue Service may levy on employee benefit plans (Brief, p. 26) (presumably pension plans as well as welfare plans). The Department of Labor also admits that ex-spouses and children of beneficiaries of benefit plans have been allowed to levy on the plans (again presumably pension plans as well as welfare plans). This admission is contrary to the Department of Labor's reliance on ERISA sections 403(c)(1), 404(a)(1) and 514(a) to deny the Board's right to levy. In other words, if these ERISA sections do not preclude ex-spouses and children from levying on pension and vacation plans, then they cannot preclude the Board's levy on a vacation plan.

VII.

THE BOARD MAY LEVY UPON A SPENDTHRIFT TRUST IN ORDER TO SATISFY A PARTICIPANT'S TAX DELINQUENCY.

The Board has shown that ERISA by its terms does not preclude the Board from levying on vacation trust funds. CLVT argues, however, that the Trust at issue in this lawsuit is a "spendthrift" trust and thus should be protected from the Board's levy. (Brief 28-29.)

Spendthrift trusts are recognized in California in furtherance of the doctrine that an owner of property should have the right to give his property to another upon any condition he sees fit to impose. (*McGolgan v. Magee, Inc.* (1916) 172 Cal. 182, 186; However, it is against public policy to permit an individual to place his own property beyond the reach of his own creditors by use of this device. Thus, in the *McGolgan* decision, the California Supreme Court said:

> Whatever may be the consideration moving from others, the trust cannot be allowed to free the property from the claims of creditors, where the consideration for the conveyance to the trustee or, as in this case, the entire trust

property constituting the source of the income, is contributed by the beneficiary himself . . . ." (*Id.* at 188-189.)

In the instant case, the participants of the vacation plans are contributing to the plans in the form of their deferred compensation which has been remitted to the vacation fund by the employer. Thus, the participants of vacation plans should not be allowed to place their own property beyond the reach of their creditor, the Board.

Further, the Board is recognized as among the particular classes of claimants who are permitted to reach a beneficiary's interests under a spendthrift trust. The recognized authorities in the field of trusts unanimously agree that a state may levy upon the beneficiary's interest in a spendthrift trust. (Bogert, Trusts and Trustees Revised (2d ed. 1979) § 224, p. 464; 2 Scott, Trusts (3d ed. 1967) p. 1222.)

This position has also been adopted by the Restatement of Trusts, Second, section 157, p. 328. This section provides in relevant part:

"§ 157. Particular Classes of Claimants.

"Although a trust is a spendthrift trust or a trust for support, the interest of the beneficiary can be reached in satisfaction of an enforceable claim against the beneficiary.

". . . .

"(d) by the United States or a State to satisfy a claim against the beneficiary."

The comment contained in the Restatement in regard to subsection (d) notes that the United States or a State can reach a spendthrift trust for the beneficiary's obligations arising completely independently of the trust. This obligation could be for a tax due. *Id.* at 331.

Cases dealing with federal taxes unequivocally hold that a spendthrift trust is not insulated from liability for taxes. *Leuschner v. First Western Bank and Trust Company* (9th Cir. 1958) 261 F.2d 705, 707-708; *Mercantile Trust Co. v. Hofferbert* (Md. 1944) 58 F.Supp. 701, 706. That these decisions are directly analogous to state tax claimants in like situations is best demonstrated by the reliance of the court in *Leuschner* upon Restatement of Trusts, Second, section 157(d) which refers to both federal and state claims. The liability of the spendthrift trust is

based upon the character of the claim as a tax delinquency and not upon the particular identity of the governmental agency asserting it.

The case of *Electrical Workers v. IBEW-NECA Holiday Trust*, 583 S.W.2d 154 (Mo. 1979), discussed the issue of spendthrift trusts. The court found that the Trust itself was valid but that the spendthrift clause was invalid. The court found that the payments made pursuant to the Holiday Trust were wages and that the IBEW member (the debtor) could "not create a trust for his own benefit and include a provision restraining the rights of his creditors." (583 S.W.2d at 162.) The court concluded:

> "In this context, we find no jurisdiction for permitting a person to do indirectly that which we [sic] cannot do directly. If a spendthrift clause such as this were held enforceable, who is to say that all wages of employees could not be sheltered from the claims of creditors by similar agreements." (*Id.*)

VIII.

ERISA SECTIONS 403(c)(1) AND 404(a)(1) DO NOT PROHIBIT THE BOARD'S LEVY.

CLVT relies on sections 403(c)(1) and 404(a)(1) of ERISA for its argument that the vacation funds could not be disbursed to the Board.

Section 404(a)(1) is the "basic fiduciary section of ERISA." (*In re Marriage of Campa* (1979) 89 Cal.App.3d 113, 128, app. dismissed (1980) 444 U.S. 1028.) Congress was concerned that fiduciaries of ERISA plans were held to a high standard of accountability. (1974 U.S. Code Cong. & Admin. News, pp. 4645, 4847, 5075 *et seq.*) "Adherence to fiduciary standards is essential to the proper administration of a pension plan." (*In re Marriage of Campa, supra*, 89 Cal.App.3d at 128, app. dismissed (1980) 444 U.S. 1028.)

Turning over accumulated vacation benefits to the Board pursuant to its levy, has no bearing on the honest administration of a vacation plan, (*See In re Marriage of Campa, supra*, 89 Cal.App.3d at 128, app. dismissed (1980) 444 U.S. 1028); thus these sections cannot preclude the Board's levy.

IX.

REVENUE AND TAXATION CODE SECTION 18817 IS NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT.

Revenue and Taxation Code section 18817 is not preempted under the National Labor Relations Act. The collection of taxes is a matter touching deeply rooted local concerns (cf. *San Diego Unions v. Garmon* (1959) 359 U.S. 236, 244) which will not conflict with the federal scheme (cf. *Farmer v. Carpenters* (1977) 430 U.S. 290, 302). Furthermore, the Board is not seeking to apply a "substantive or remedial law whose formulation or application would involve weighing the same competing interests of employers, employees, labor unions and the public among which Congress struck a balance in establishing a national legal framework for the conduct of organizational activity, collective bargaining and labor disputes." (Cox, "Labor Law Preemption Revisited," 85 Harv. L. Rev. 1337, 1365 (1972).)

X.

ANY ADMINISTRATIVE DUTIES CAUSED BY THE BOARD'S LEVY ARE OUTWEIGHED BY THE STATE'S RIGHT TO THESE FUNDS.

CLVT has argued that there would be an administrative burden if it is required to honor the Board's levy. (Brief, p. 29.)

The administrative burden argument would be equally applicable to federal tax levies. However, pension plans are specifically subject to federal tax levies. 26 C.F.R. § 1.401(a)-13(b)(2), and the Department of Labor has advised CLVT that vacation plans are also subject to federal tax levies. (J.A., 72.)

This argument was rejected by the Court in *American Tel. & Tel. Co. v. Merry* (2nd Cir. 1979) 592 F.2d 118 which balanced the increased administrative costs against the heavy burden that would be imposed on the public treasury if dependent spouses and children could not enforce their support rights and had to rely on welfare assistance. (*Id.* at 125.) In the case at bar, it is equally apparent that the right of California to collect its revenue easily outweighs any administrative costs to CLVT.

Conclusion.

It is clear that the District Court did not have subject matter jurisdiction of this action. It is also apparent that Revenue and Taxation Code § 18817 does not interfere with the provisions or purposes of ERISA. For these reasons the Board respectfully contends that the Decision of the Ninth Circuit Court of Appeals below should be reversed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

v.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE AND BRIEF OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

The American Federation of Labor and Congress of Industrial Organizations respectfully moves this Court for leave to file the accompanying brief *amicus curiae* in support of the position of the appellees in this case.

INTEREST OF THE AMICUS CURIAE AND THE ISSUES COVERED IN ITS ATTACHED BRIEF

The AFL-CIO is a federation of 99 national and international unions having a total membership of 14,000,000 working men and women. The instant case concerns vaca-

tion trust funds sponsored by many AFL-CIO affiliates for their members and, in particular, whether the preemption provision of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.*, protects those trust funds (and other employee welfare benefit funds) against intrusions by state tax law. A ruling that ERISA does not preempt State tax laws as applied to vacation trust funds would be profoundly harmful to the interests of AFL-CIO union members.

In the attached brief *amicus curiae* we address only the issue of preemption and defer to the appellees' brief on the jurisdictional and constitutional issues. We show that the clear intent of Congrees, as expressed in the language of § 514 of ERISA, as originally enacted, and as amended in 1982 and in the legislative history of the original Act and of the 1982 amendment, is to preempt State tax laws such as that here in issue. Section 514(a), using all-inclusive language, preempts "any and all State laws insofar as they now or hereafter relate to any [ERISA-covered] employee benefit plans" not specifically exempted in § 514(b). And the legislative history of the 1974 Act shows that Congress rejected suggestions to exempt State tax laws from the sweeping preemption effected by § 514. Moreover, in 1982 Congress amended § 514(b) of ERISA to exempt one particular State law from preemption, but in so doing added § 514(b)(5)(B)(i) to explicitly provide that no "State tax law relating to employee benefit plans" is exempted from preemption. The legislative history of the 1982 amendments indicates § 514(b)(5)(B)(i) was added to reaffirm that § 514(a), as originally enacted, and as amended, preempts State tax laws to the extent those laws relate to employee benefit plans.

CONCLUSION

For the above stated reasons this motion for leave to file a brief *amicus curiae* should be granted.

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amicus curiae* is set forth in that motion. As stated therein, in this brief we address only the issue of whether the levy of the Franchise Tax Board of the State of California ("Board") on assets held by the Construction Laborers Vacation Trust for Southern California ("CLVT" or "Trust") is preempted by the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. § 1001, *et seq.* We defer to the brief of the appellees on the jurisdictional and constitutional issues raised.

SUMMARY OF ARGUMENT

California's effort to levy against the appellee CLVT is precluded by § 514 of ERISA; § 514(a), using all-inclusive language, preempts "any and all State laws insofar as they now or hereafter relate to any [ERISA-covered] employee benefits plans" not specifically exempted

in § 514(b). The terms of § 514(b) demonstrate Congress' care in addressing the preemption problem and the narrow specificity of Congress' limitations on the broad preemption rule stated in § 514(a). Appellant does not even argue that the present case comes within any of these exceptions. Section 514(c) defines with completeness the terms "State law" and "State" as used in § 514(a), and the definitions in § 3(3) of ERISA allow no doubt that the term "employee benefit plan" in § 514(a) extends to vacation trusts, such as the CLVT, no less than to pension plans.

The legislative history of § 514 confirms that the sweeping language of § 514 accurately reflects the congressional purpose. That language was developed in conference. The ERISA Conference Report, and the floor explanations of the leading conferees, Senators Williams and Javits and Representative Dent, uniformly explained the conferees' deliberate choice that employee benefit plans covered by ERISA should be subject to federal law exclusively, with the narrow exceptions specifically set forth. In drafting the language of what became § 514, the ERISA Conference Committee rejected an Executive Branch proposal that would have preserved State authority "to prescribe rules and regulations governing the tax qualifications and taxation of contributions, distributions or income, of an employee benefit plan . . . ." Moreover, in 1982, Congress amended § 514(b) to exempt one particular State law from preemption, but in so doing added § 514(b)(5)(B)(i) to explicitly provide that no "State tax law relating to employee benefit plans" is exempted from preemption. The legislative history of the 1982 amendment shows that § 514(b)(5)(B)(i) was added to reaffirm that § 514(a), as originally enacted, and as amended, preempts State tax laws to the extent those laws relate to employee benefit plans. This history "throw[s] a cross light" on the 1974 Act, further confirming the breadth of § 514(a). (*Cf. Michigan Nat. Bank v. Michigan*, 365 U.S. 467, 481, quoting L. Hand, J.)

ARGUMENT

SECTION 514 OF ERISA PROTECTS APPELLEE VACATION TRUST FROM CALIFORNIA'S TAX LEVY

A. The Statutory Language

"We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute iself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." (*Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108).

The pertinent statutory language governing the preemption issue in this case is contained in § 514 of ERISA, 29 U.S.C. § 1144. The sweeping scope of the preemption of State law Congress intended in enacting ERISA is evident from the language of § 514(a):

> Except as provided in subsection (b) of this section the provisions of this title and title IV shall supersede *any and all State laws* insofar as they may now or hereafter *relate to any employee benefit plan* described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975. [Emphasis added]

Appellant, in arguing against preemption, advisedly does not invoke any of the exceptions to subsection (a) set forth in subsection (b) of § 514. However, that provision, too, merits attention, because subsection (b) demonstrates Congress' care in addressing the preemption problem, and the narrow specificity of Congress' limitations to ERISA's broad preemption rule. Especially pertinent in ERISA, as originally enacted,[1] are subsections (b)(2) and (b(4) of § 514:

---

[1] Section 514(b)(5), added to ERISA this year, is discussed at pages 11 to 15, *infra*.

(2)(A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

• • • •

(4) Subsection (a) shall not apply to any generally applicable criminal law of a State.[2]

Section 514(c)(1), in turn, defines the term "State law" as used in subsection (a) to include "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." So, too, the term "State" is defined in § 514(c)(2) with completeness as including "a State, any political subdivision thereof, or any agency or instrumentality of either, which purports to regulate, *directly or indirectly*, the terms and conditions of employee benefit plans covered by this title."

The "employee benefit plan[s]" to which § 514(a) extends preemptive protection are also defined in ERISA. Section 3(3), 29 U.S.C. § 1002(3), provides:

The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pen-

---

[2] Section 514(b)(1) reaffirms the effective date as stated in the last sentence of § 514(a). Section 514(b)(3) preserves the Secretary of Labor's use of services or facilities of a State agency as permitted by § 506 of ERISA.

> sion benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

And the term "employee welfare benefit plan" is defined in § 3(1) of ERISA, 29 U.S.C. § 1002(1) to mean:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or *vacation benefits*, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions). [Emphasis added.]

The CLVT is a vacation benefits plan and is covered by § 302(c)(6) of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 186(c)(6).

The sum of the legislative language, as this Court has recognized, is that

> [Section 514(a)] demonstrates that Congress intended to depart from its previous legislation that "envisioned the exercise of state regulation power over pension funds," *Malone v. White Motor Corp.*, 435 U.S. 497, 512, 514 (1978) (plurality opinion), and meant to establish pension plan regulation as exclusively a federal concern. [*Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (hereafter "*Alessi*").]

Appellant contends "that the *Alessi* case has no application to the case at bar because *Alessi* concerned *pension* trusts while the case at bar concerns *vacation* trusts."

(App. Br. 34, emphasis in original) But while *Alessi* involved only pension plans, and the Court therefore referred only to such plans, § 514(a) of ERISA is not so limited. As we have seen, that provision refers in terms of "any employee benefit plan", a defined term that includes vacation trusts like CLVT. The broad language of § 514(a) also leaves no room for appellant's reliance on the fact that this case involves a State tax levy statute. (App. Br. 20-23). As one district court stated in a decision that was ultimately affirmed by this Court:

> There is simply no basis in the language of § 514(a) for distinguishing between types of state laws all of which "relate to" employee benefit plans. When Congress says "any and all State laws," courts cannot conclude that Congress really meant to say "some but not all State laws." [*Standard Oil Co. of California v. Agsalud*, 442 F. Supp. 695, 707 (N.D. CA), *affirmed and quoted with approval*, 633 F.2d 760, 765 (C.A. 9), *affirmed*, 454 U.S. 801 (hereafter "*Agsalud*").]

Under the plain language of § 514 the Board's levy on the CLVT and the California Revenue and Taxation Code provision authorizing that levy are preempted. The CLVT is a protected employee benefit plan. The Boards' levy and authorizing statute are "State laws" that most assuredly "relate to any employee benefit plan" and are preempted under § 514(a). These "State laws" are not exempted from preemption under § 514(b); the tax code is not an insurance, banking or securities law and is not claimed by appellant to be a generally applicable *criminal* law. And, while the Tax Code may be a generally applicable *civil* law, the obvious implication of § 514(b)(4) is that generally applicable State civil laws are preempted to the extent that those laws relate to ERISA-covered plans.

B. The Legislative History

1. *The 1974 Act*

The sweeping language of § 514 accurately reflects the Congress' purpose in 1974—*viz.* to federalize the law of employee benefits and to preserve ERISA-covered pension and welfare plans not merely against regulation by the states in some narrow or technical sense of "regulation" but against the touch of any and all State laws not specifically exempted without regard to the extent of the touching. The 1974 legislative history was thoroughly examined and discussed by Judge Renfrew in *Hewlett-Packard Co. v. Barnes*, 420 F. Supp. 1294 (N.D. CA), *affirmed* 571 F.2d 502 (C.A. 9), *cert. denied*, 439 U.S. 831, and we quote that discussion in full:

> The history of ERISA indicates that Congress, while attempting to formulate legislation concerning employee benefit plans, devoted considerable attention to the question of preemption. Over a period of years, Congress heard testimony from a number of individuals who held widely divergent views on the proper scope of federal preemption in the area. While both houses favored preemption of some variety, the House and Senate originally outlined its scope somewhat differently. The House version of H.R. 2, 93d Cong., 1st Sess. (1973), the bill from which ERISA derives, generally limited the scope of preemption to state regulation of areas expressly covered by the bill; *i.e.*, reporting, disclosure, and fiduciary duties with respect to employee benefit plans. In addition, it specifically preempted state regulation involving funding, financing, and forfeitability of such plans. Somewhat more ambiguously, the Senate version of H.R. 2 preempted state law insofar as it "relate[s] to subject matters regulated by this Act or the Welfare and Pension Disclosure Act * * *."
>
> The more sweeping and precise language of Section 514 of ERISA was developed in conference committee. The Conference Report indicates that the com-

mittee intended preemption just as broad as the statutory language suggests:

> "Under the substitute, the provisions of title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce. (However, following title I generally, preemption will not apply to government plans, church plans not electing under the vesting, etc., provisions, workmen's compensation plans, non-U.S. plans primarily for nonresident aliens, and so-called 'excess benefit plans.')" S.R. 93-1090, 93d Cong., 2d Sess. 383 (1974).

Statements made in the House and Senate debates which preceded the enactment of the conference committee's version of the bill demonstrate that Congress both comprehended the change and intended the statute to occupy the entire field of employee benefit plan regulation. Senator Harrison Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare, emphasized the broad scope of Section 514:

> "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law." 120 Cong. Rec. 29933 (1974).

Similarly, Congressman John Dent, Chairman of the Subcommittee on Labor of the House Labor and Education Committee, explained:

> "Finally I wish to make note of what is to many the crowning achievement of this legisla-

tion, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation.

• • • •

"The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof—including any professional society or association operating under color of law—which would affect any employee benefit plan as description in section 4(a) and not exempt under section 4(b)." 120 Cong. Rec. 29197 (1974).

Finally, Senator Jacob Javits, the ranking minority member of the Senate Committee on Labor and Public Welfare, stressed the intentional replacement of a limited preemption provision with the more comprehensive language of Section 514(b)(2):

"Both House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill. Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.

"Although the desirability of further regulation—at either the State or Federal level—un-

> doubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs. The conferees—recognizing the dimensions of such a policy—also agreed to assign the Congressional Pension Task Force the responsibility of studying and evaluating preemption in connection with State authorities and reporting its findings to the Congress. If it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made." 120 Cong. Rec. 29942 (1974).

> Overall, the legislative history reveals both that Congress carefully considered the question of preemption, including the feasibility of enacting a more limited preemption provision, and that Congress ultimately enacted Section 514(a) with the express purpose of summarily preempting state regulation of ERISA-covered employee benefit plans. That the statute, standing alone or buttressed by its legislative history, was intended to supersede state regulation of benefit plans such as plaintiffs' is indisputable. [425 F. Supp. at 1298-1300, footnotes omitted]

The foregoing was approved by the court of appeals in affirming, 571 F.2d at 904, and was incorporated by reference by Judge Renfrew in his subsequent opinion in *Agsalud*, 442 F. Supp. at 707, and by the court of appeals in that case, 633 F.2d at 764.

The foregoing legislative history fully confirms that the sweeping language of § 514(a) accurately captures the true congressional intent. Even if there were any ambiguity in § 514's words that would leave room for appellant's antipreemption argument—and we think there

is none—such ambiguity must be resolved in favor of preemption in light of the clear, and uncontradicted, statements of congressional intent quoted above. And while that legislative history is more than sufficient to rebut appellant's effort to find a safe harbor from preemption for its levy against CLVT, there is additional specific evidence in the history of the 1974 Act that State tax laws are subject to preemption under ERISA.

It will be recalled that the preemption language as enacted was developed in conference. (See pp. 7-8, *supra*.) The Conference Committee was presented with elaborate recommendations concerning the pending pension reform legislation by the Department of the Treasury and the Department of Labor. (See III Leg. Hist. 5048.)[3] On the issue of preemption those departments sought to assure that a State "could regulate the tax aspects of retirement plans." (III Leg. Hist. 5145.) In order to accomplish that result the following was proposed:

> Notwithstanding the provisions of this section, a State shall have the authority to prescribe rules and regulations governing the tax qualification and taxation of contributions, distributions or income, of an employee pension benefit plan (including a trust forming a part of such plan) as defined in the Welfare and Pension Plans Disclosure Act. [III Leg. Hist. 5147]

The ERISA Conference Committee declined to accept this recommendation, and § 514 as enacted does not contain the foregoing or any other language saving any State tax law from preemption.

2. *The 1982 Amendment*

By § 201 of the Periodic Payment Settlement Act of 1982, Congress added § 514(b)(5) to ERISA. This provision is a direct response to this Court's affirmance in

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[3] "Leg. Hist." refers to the three-volume Legislative History of the Employee Retirement Income Security Act of 1974 (GPO 1976).

Agsalud, supra, of the Ninth Circuit decision invalidating the Hawaii Prepaid Health Care Act. The new § 514 (b) (5) (A) of ERISA provides:

> Except as provided in subparagraph (B), subsection (a) [of § 514] shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51). [4]

---

[4] Public Law 97-473, Jan. 14, 1983, 96 Stat. 2605. Section 201 reads in full as follows:

> SEC. 201. TREATMENT OF HAWAII PREPAID HEALTH CARE ACT UNDER EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974.
>
> (a) EXEMPTION FROM PREEMPTION.—Section 514(b) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1144(b)) is amended by adding at the end thereof the following new paragraph.
>
> "(5)(A) Except as provided in subparagraph (B), subsection (a) shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).
>
> "(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a)—
>
> "(i) any State tax law relating to employee benefit plans, or
>
> "(ii) Any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.
>
> "(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after the date of the enactment of this paragraph), but the Secretary may enter into cooperative arrangements under this paragraph and section 506 with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.".
>
> (b) TREATMENT OF OTHER STATE LAWS.—The amendment made by this section shall not be considered a precedent with respect to extending such amendment to any other State law.
>
> (c) EFFECTIVE DATE.—The amendment made by this section shall take effect on the date of the enactment of this Act.

Section 514(b)(5)(B) in turn provides, in presently pertinent part:

> Nothing in subparagraph (A) shall be construed to exempt from subsection (a) [of § 514]
>
> • • • •
>
> (i) Any State tax law relating to employee benefit plans, • • •.

The brief legislative history of this State tax law preemption provision indicates that Congress included the foregoing savings clause to preclude any misinterpretation of the new exception for Hawaii's health care law, as disapproving the construction of § 514 in *Agsalud*. The report of the Senate Committee on Finance reflects Congress' precautionary purpose of reaffirming that State tax laws continue to be preempted under § 514(a) despite the Hawaii waiver:

> Also, the provision does not affect the status, under the preemption provisions of ERISA, of any State tax law relating to employee benefit plans. [Senate Report No. 97-646, 97th Cong., 2d Sess. 18 (1982)].

The Chairman of the Finance Committee, Senator Robert Dole, continued this theme in his floor explanation of the bill:

> The bill amends ERISA to provide that Hawaii law relating to employer maintained health insurance plans would not be preempted by ERISA to the extent that the Hawaiian law does not relate to matters thoroughly regulated under ERISA or impose tax liability on insurance premiums or benefits. [128 Cong. Rec. S 13151 (daily ed., October 1, 1982).]

On the House side, Representative Erlenborn, who had been a member of the 1974 ERISA Conference Committee and had signed its Conference Report (III Leg. Hist. 4654), expressly endorsed the *Agsalud* decision as a correct interpretation of § 514:

> These amendments of ERISA section 514 serve to *reaffirm the broad Federal preemption of State laws* as they relate to employee benefit plans as was the original intent of ERISA. . . . Last year the Supreme Court let stand the decision of the Ninth Circuit Court of Appeals in Standard Oil Company of California against Agsalud that the broad preemptive framework relating to both pension and welfare (for example, health) plans agreed to by the ERISA conferees does in fact supercede the Hawaii statute. The agreement to amend ERISA to permit the future application of the Hawaii law was reached solely on the basis and with the understanding that the Hawaii law is an unusual special case . . . and that the law will be permitted to operate only as a narrow exception which is not expected to do violence to the strong Federal preemption scheme. *In agreeing to the Hawaii exception this body will be reaffirming the broad scope of ERISA preemption and the validity of the interpretation of the Federal courts* in connection with the Hawaii statute. [128 Cong. Rec. H9609-9610 (daily ed., December 13, 1982), (emphasis added).]

The 1982 amendment to § 514, as explained by its proponents

> cannot, of course, by itself conclusively establish what Congress had in mind in [1974]. But it does " 'throw a cross light' " on the earlier enactment that, together with the latter's legislative history, demonstrates beyond doubt the correctness of [our interpretation of § 514]. *Michigan Nat. Bank v. Michigan*, 365 U.S. 467, 481 (1961) (quoting L. Hand, J.). Cf. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 194 (1967); *NLRB v. Drivers Local Union*, 362 U.S. 274, 291-292 (1960). [*Pipefitters v. United States*, 407 U.S. 385, 412-413]

See also *North Haven Board of Education v. Bell*, —— U.S. ——, 102 S.Ct. 1912, 1925 (May 17, 1982).

C. The Upshot

It is clear from the foregoing that the California Revenue and Tax Code is preempted by ERISA insofar as the Code purports to authorize a levy against a vacation trust subject to ERISA in order to collect unpaid tax liabilities of beneficiaries of that trust. None of appellant's arguments show otherwise.

(i) The contention that the all-encompassing phrase "relate to any employee benefit plans" in § 514(a) is "qualified" by the language of the provision (§ 514(c)(2)) defining the term "State" for ERISA preemption purposes (App. Br. 20-21) is specious. That contention proceeds from the proposition that "regulate", which is used in subsection (c)(2), is a more restrictive term than "relate to", which is used in subsection (a). "Thus," according to appellant, "a State law only 'relates' to an employee benefit plan if it *regulates* the *terms* and *conditions* of the plan." (App. Br. 20, emphasis in original).

Since the phrase "relate to" is as broad as any which Congress could have chosen to describe laws which in any manner affect employee benefit plans, we can accept appellant's premise that the term "regulate" is somewhat narrower. Thus, there might be room for appellant's argument if § 514(c)(2) had defined "State" as including "a State * * * which regulates * * * the terms and conditions of employee benefit plans." Even then, the question would remain whether subsection (c)(2) was intended to limit subsection (a), or simply to assure that the use of the word "State" in § 514(a) is not construed to exclude political subdivisions, or certain types of agencies. (We would imagine, for example, that absent § 514(c)(2) the *present* appellant would have argued that Congress could not have intended to preempt the activities of a taxing agency.)

The actual language of § 514(c)(2), however, pretermits any question of whether "regulate" is intended to

narrow "relate to". That language provides that the "term 'State' includes a State * * * which *purports to regulate, directly or indirectly*, the terms and conditions of employee benefit plans covered by this Act." (Emphasis added.) The phrases "purports to" and "*directly or indirectly*" leave no room for the kind of word play in which appellant engages. (See *Alessi*, *supra*, 451 U.S. at 525.)

The appellant's attempted levy against the Trust "relates to," and "regulates," indirectly if not directly, the CLVT in two ways: 1) the levy would remove assets from the Trust; and 2) the levy would override the Trust's anti-alienation provisions.

The former point is self-evident. As to the latter, the court below found that the "trust is a spendthrift trust designed to insure that the beneficiaries do not dissipate the benefits" (F.2d at 1308; see also *id.* at 1308-1309, quoting Article 9.08 and § 4.06 of the Trust Agreement.) The CLVT's anti-alienation rule would be overridden by State law if appellant prevails. This § 514 does not permit. As *Alessi* recognized, Congress intended to give employee benefit plan sponsors wide discretion in designing their plans: "ERISA leaves this question [*viz.* the content of benefits] largely to the private parties creating the plan." (451 U.S. at 525.)

(ii) Appellant cites two lower court decisions which relied on § 206(d)(1) of ERISA, 29 U.S.C. § 1056(d)(1) in holding that beneficiaries' interests in employee benefit plans other than pension plans could be garnisheed. (App. Br. 30-31). Section 206(d)(1) requires that "each pension plan shall provide that benefits provided under the plan may not be assigned or alienated." Congress thereby permitted the sponsors of employee benefits plans *other than pension plans* to determine in their trust instruments whether interests in such other plans could be assigned or alienated. But Congress did not thereby create an exception to § 514 permitting the States to com-

pel the alienation of such interests notwithstanding the provisions of the trust instruments.

(iii) Appellant cites no case which supports its contention that a "state's tax laws are entitled to a special presumption against preemption." (App. Br. 21-23). As appellant acknowledges, *Hisquierdo v. Hisquierdo*, 439 U.S. 572, on which this argument is built, involved "State family property law" (*id.* at 581) and not a State tax levy statute. The rule of construction declared in *Hisquierdo* explains and may justify the result in cases cited in Appellant's Brief 26-29, but is simply irrelevant in determining whether the clear language of § 514 of ERISA preempts a tax levy statute. And we note that the result in *Hisquierdo* shows that even the rule of construction stated in that case creates a rebuttable, rather than irrebuttable presumption against preemption. Here the legislative materials are more than sufficient to show Congress' clear intent to preempt the State tax levy at issue.

(iv) Appellant's suggestion that "ERISA section 514 (a) may be unconstitutional if it interferes with the sovereign right of the State of California to *uniformly collect taxes from all of its citizens*" (App. Br. 36, emphasis added) misstates the facts of this case. California's right to collect taxes from its citizens is simply not at issue here. What California seeks to do is to collect from a trust established under the aegis of federal law, money which, by the terms of the agreement pursuant to which moneys are paid into the trust, the individuals who are California taxpayers have no right to receive or to alienate. What California is seeking to do is to use the Trust as a convenient collection agency for the State. Neither the existence of the Trust, or of the federal law that precludes California from levying on the assets of that Trust, renders it any more difficult for California to collect from its taxpayers than if the Trust had not been established. Since the constitutional doubts appellant

raises are not even colorable, let alone "serious", the rule of *Machinists v. Street*, 367 U.S. 740, 749 (App. Br. 36) is inapplicable. (See *Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (Cardozo, J.).

CONCLUSION

For the foregoing reasons, the court of appeals correctly determined that § 514 of ERISA protects the CLVT from the levy appellant seeks to impose.

Respectfully submitted,

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No. 82-695

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST
FOR SOUTHERN CALIFORNIA, et al.,
Appellees.

BRIEF AMICI CURIAE

On Behalf of the Boards of Trustees of the Carpenters Vacation and Holiday Trust Fund for Northern California, the Laborers Vacation-Holiday Trust Fund for Northern California, and the Cement Masons Vacation/Holiday Trust Fund for Northern California In Support of Position of Appellees

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BRIEF AMICI CURIAE

On Behalf of the Boards of Trustees of the Carpenters Vacation and Holiday Trust Fund for Northern California, the Laborers Vacation-Holiday Trust Fund for Northern California, and the Cement Masons Vacation/Holiday Trust Fund for Northern California In Support of Position of Appellees

This brief as *amici curiae* is submitted on behalf of the Boards of Trustees of the Carpenters Vacation and Holiday Trust Fund for Northern California, the Laborers Vacation-Holiday Trust Fund for Northern California and the Cement Masons Vacation/Holiday Trust Fund for Northern California (herein the "Northern California Funds") with the written consent of the Appellant and the Appellees. The written consents are being filed with this brief in the office of the Clerk.

NATURE OF THE INTEREST OF THE NORTHERN CALIFORNIA FUNDS

Each of the Northern California Funds is a joint labor-management trust established by collective bargaining between employers and unions in the building and construction industry in conformance with the requirements of Section 302(c)(6) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(6). Each Fund is an employee welfare benefit plan covered by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*, commonly known as "ERISA."

The Northern California Funds are similar to the Appellee Construction Laborers Vacation Trust for Southern California in all respects material to this appeal. The Trust Agreement establishing each Fund contains anti-alienation provisions substantially identical to the anti-alienation provisions of the Trust Agreement establishing the Appellee Fund.

The anti-alienation provisions of the Northern California Fund Trust Agreements are supplemented by other provisions making clear that the purpose of the prohibition against alienation is to preserve intact the money contributed to the Funds by individual employers for the sole purpose of providing paid vacations and holidays to covered employees.

Section 1 of Article III of the Trust Agreement establishing the Carpenters Fund provides:

> "The Plan is established for the benefit of the Employees and the objective of the Plan is to provide such Employees with paid vacations and paid holidays from work, thereby allowing the Employee to return to his work refreshed and reinvigorated and securing to the Individual Employer the performance of better and more efficient work. The restrictions imposed by the Plan upon the use and enjoyment by the Employ-

ees of the moneys contributed by the Individual Employers are for the purpose of accomplishing this objective, and are voluntarily assumed and agreed to by the Employees for this purpose."

Section 7 of Article V of the same Trust Agreement provides:

"It is the intent and purpose of the Plan, and of this Agreement, and a material part of the consideration for the making of Contributions to the Fund by Individual Employers, that the money in each vacation and holiday account shall be received by the Employee entitled thereto personally and shall in fact be used by him personally to enable him to take a bona fide vacation and holiday from work, and for no other purpose. Accordingly, no Contributions due the Fund, and no moneys in vacation and holiday accounts established pursuant to the Plan, shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge by any Employee or any other person, except as provided in Section 4 of Article IV, and any such anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge shall be void and ineffective. The money credited to a vacation and holiday account shall only be subject to withdrawal at the times, in the manner and for the purposes specified in this Agreement."

Section 1 of Article III and Section 5 of Article IV of the Laborers Fund Trust Agreement and the Cement Masons Fund Trust Agreement contain substantially identical provisions.

The sums contributed to the Northern California Funds are substantial and they impose a heavy responsibility upon the Boards of Trustees of the Funds to protect the

contributed moneys from diversion to purposes other than vacations and holidays. During the work year 1981-82 over $36,000,000 was contributed to the Carpenters Fund by more than 3300 individual employers, and was entrusted to the Board of Trustees of the Fund for distribution to more than 32,000 carpenters for paid vacations and holidays during 1983. During the same work year, over $24,000,000 was contributed to the Laborers Fund by more than 2200 employers and over $4,500,000 was contributed to the Cement Masons Fund by more than 700 employers, for distribution at the commencement of the vacation year to more than 16,000 laborers and more than 3200 cement masons, respectively.

Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), requires the Board of Trustees of each Fund to discharge its fiduciary duties with respect to the plan "solely in the interest of the participants and beneficiaries and—

> (a) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries, and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> * * * * *
>
> and;
>
> (d) in accordance with the documents and instruments governing the plan insofar as such documents and instrument are consistent with the provisions of" Title I of ERISA.

Section 409(a) of ERISA, 29 U.S.C. § 1109(a), provides that "any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title [Title I] shall be personally liable to make good to such plan any losses

to the plan resulting from each such breach . . . and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary."

Each of the Funds, like the Appellee Fund, has been served with Notices to Withhold by the Appellant Franchise Tax Board. It is vitally important to the Board of Trustees of each Fund, therefore, to know whether or not it is prohibited by federal law from honoring such notices.

ARGUMENT

I

Federal law prohibits the diversion to State tax obligations of money contributed by employers to a trust fund pursuant to a collective bargaining agreement for the sole and exclusive purpose of providing paid vacations and holidays to their employees

Section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186, prohibits the establishment and continued existence of trust funds, such as the Appellee Fund and the Northern California Funds, unless the trust funds comply strictly with the requirements of subsection (c)(6) of that Section. Subsection (c) (6) permits such trust funds only if the money paid to the funds is "for the sole and exclusive benefit of employees" of the employers contributing to the funds, "and their families and dependents," and only if the funds are established "for the purpose of pooled vacation, holiday, severance or similar benefits."

The diversion to the Franchise Tax Board for tax purposes of money contributed by employers to a trust fund for the exclusive purpose of providing paid vacations and holidays to their employees violates two key aspects of the prohibitions of Section 302.

Firstly, it makes available to an outsider moneys which Congress intended to be used only for the benefit of em-

ployees of the contributing employers and their families and dependents.

In condemning a violation of this congressional intent, the Court, in the landmark case of *Blassie v. Kroger Company* (8th C.A. 1965) 345 F.2d 58, said (pp. 75-76):

> "**The pharmacy and its availability to outsiders.** Only Blassie and Etzel appeal as to this. The Trust's Saint Louis building which houses its Medical Institute contains space for a pharmacy. The Trust leased this space and fixtures to two brothers. The lessees operate the pharmacy but are obligated to make drugs available to trust beneficiaries on a cost plus basis. This effects a substantial savings for the customer. **The favorable patronage, however, has not been restricted to beneficiaries of the Trust.** Instead, it has been made available to members of three other unions and perhaps other persons connected with the Trust.
>
> "**The district court held that the Trust is one solely for the benefit of the trust beneficiaries and that the pharmacy's availability to outsiders violates the statute.**
>
> • • • • •
>
> "We agree with the reasoning of the district court. **The Trust and its assets are solely for the benefit of its beneficiaries.** We see nothing violative of § 302(c) or of the trust agreement in the trustees' insistence that the lessees furnish drugs to trust beneficiaries at a reduced price. At the same time, we see nothing legal in a direction by the trustees, through contract or otherwise, that this favorable arrangement be extended and made available for non-beneficiaries, such as union members who are not covered employees, members of other unions, or an outsider of any kind.
>
> • • • • •

"We realize that there will be difficulties in enforcement here and that there are easy ways for a beneficiary or a pharmacist, or others, to get around the restriction. Nevertheless, the principle exists. This is a trust, with all the implications which that term possesses. **The trustees may not, directly or indirectly or through the lessees, by contract, rebate, insufficient rent, dictation, pressure, or in any other manner, afford benefits to outsiders which belong exclusively to the beneficiaries.**"[1]

Secondly, the diversion of the moneys to the Franchise Tax Board would require that such moneys be used for a purpose which is not permitted by any of the exemptions in Section 302.

In holding that such a result violates Section 302, the Court, in *Local No. 2, etc. v. Paramount Plastering, Inc.* (9th C.A. 1962) 310 F.2d 179, said (pp. 186-191):

"This court can believe that Congress might well have, or even should have, provided additional exemptions, permitting the setting up of laudable trusts that are vital to the preservation of the economic position of both labor and management, yet this court cannot be the arbiter of what such exemptions should be. That is the duty and responsibility of Congress. As Judge Yankwich ruled: **Congress proscribed certain practices and permitted others in labor-management agreements, and permitted 'joint trust funds for certain purposes only.'**

* * * * *

"We conclude that the evidence in this case clearly establishes that the three trusts (Industry Program, Labor-Management Relations Trust, and the Institute Trust) as well as the succeeding corporate entity, are

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[1]Throughout this brief emphasis is added unless otherwise indicated.

severally 'representative' of employees as that term is used in § 302(a) and (b); and that the purposes, powers and functions of the trusts and corporation here involved are not within the exemptions created by Congress, **and are not permissible objects for the use of joint trust funds.**

"We do not quarrel in the slightest with the laudable objectives of the trust amicably created by labor and management in this case. We sympathize with the efforts of both labor and management to solve a vexing industry problem. But like so many of such present day problems, our duty is to rule in accordance with that which the 'Congress in its wisdom' has seen fit to enact. **We cannot widen the door when the door sill has been carefully tailored by the representatives in Congress. The relief sought by the appellants herein must be found in congressional and not judicial action.**"

When Congress amended Section 302 in 1959 to add an exemption permitting the establishment of collectively bargained funds for pooled vacation and holiday purposes (see *Local No. 2, etc. v. Paramount Plastering, Inc., supra,* at p. 186), it had specifically in mind the transitory nature of employment in the building and construction industry and the special problems this type of employment presented for both employers and employees in the industry (U.S. Code Cong. and Adm. News, pp. 2318, 2344-2345; see *Contractors, Laborers, Teamsters Health and Welfare Fund v. Associated Wrecking Company* (8th C.A. 1981) 638 F.2d 1128, 1131). Since building tradesmen "work for many different employers on different jobs over a relatively short period of time," the best if not the only practical way to provide them with paid vacations and holidays is to handle such benefits "through a central fund with contributions based upon the hours they work for particular employers" (see *Denver Metro. Assn. v. Journeyman Plumbers* (10th C.A. 1978) 586 F.2d 1367, 1371; *cf. Associated Builders &*

Contractors v. Carpenters Vacation and Holiday Trust Fund for Northern California, C.A. 9th, Nos. 81-4122, 81-4359, 81-4687, March 10, 1983, filed opinion, pp. 8-9, 11). Such central funds however, present easy and readily available targets for those who, like the Appellant Franchise Tax Board, seek to divert the funds to purposes which they consider laudable but which have not been sanctioned by Congress.

Like the Court in *Paramount Plastering*, we do not quarrel in the slightest with the laudable objectives of the Appellant Franchise Tax Board. The protection of the public fisc, and the collection of taxes owed to the State by its citizens, is an important public purpose. The provision of paid vacations and holidays to wage earners, however, is also a laudable objective.

In *Lines v. Fredericks* (1970) 400 U.S. 18, 91 S.Ct. 113, this Court held that a bankrupt wage earner's vacation pay, accrued but unpaid at the time of filing his petition, did not pass to the trustee in bankruptcy as "property" under the Bankruptcy Act. The Court said (400 U.S., at pp. 19-20, 91 S.Ct., at pp. 113-114):

> "The most important consideration limiting the breadth of the definition of 'property' lies in the basic purpose of the Bankruptcy Act to give the debtor a 'new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt. . . .'
>
> • • • • •
>
> "Applied to the set of facts before us here, the principles reflected in the earlier cases compel a decision for the bankrupt. . . . [T]he respondents here are wage earners whose sole source of income, before and after bankruptcy, is their weekly earnings. **The function of their accrued vacation pay is to support the basic requirements of life for them and their families during**

brief vacation periods or in the event of layoff. Since it is a part of their wages, the vacation pay is 'a specialized type of property presenting distinct problems in our economic system,' Sniadach v. Family Finance Corp., 395 U.S. 337, 340, 89 S.Ct. 1820, 1822, 23 L.Ed.2d 349. Where the minimal requirements for the economic survival of the debtor are at stake, legislatures have recognized that *protection that might be unnecessary or unwise for other kinds of property may be required.* See, e.g., the Consumer Credit Protection Act, § 301, 82 Stat. 163, 15 U.S.C. § 1671 (1964 ed., Supp. V).

"The wage-earning bankrupt who must take a vacation without pay or forego a vacation altogether cannot be said to have achieved the 'new opportunity in life and [the] clear field for future effort, unhampered by the pressure and discouragement of preexisting debt,' Local Loan Co. v. Hunt, supra, which it was the purpose of the statute to provide."

The objective of the 1959 amendment to Section 302 was to protect the interests of wage earners in paid vacation and holidays articulated by this Court in the *Lines* case. Congress achieved this objective by requiring that money contributed by employers to collectively bargained trust funds to provide vacation and holiday benefits for their employees must be used for the sole and exclusive benefit of such employees, their families and dependents, and solely for vacation and holiday purposes. If any part of the moneys so contributed is to be diverted pursuant to state law to the benefit of other persons and for other purposes, Congress must amend the statute further to permit such diversion.

Congress has not amended Section 302 to permit the diversion sought to be enforced by the Appellant Franchise Tax Board. Instead, it has enacted ERISA, 29 U.S.C. § 1001, *et seq.*, which incorporates and strengthens the re-

strictions against the diversion to outsiders of vacation and holiday benefits intended exclusively for employees, their families and dependents.

Like Section 302 (c), ERISA requires that an employee vacation and holiday plan be established and maintained pursuant to a written instrument. (Section 402(a)(1), 29 U.S.C. § 1100(a)(1)). As the Conference Committee explained, "[a] written plan is to be required in order that every employee may, on examining the plan documents, determine **exactly what his rights and obligations are under the plan.**" (*Legislative History of ERISA*, p. 4564).[2]

ERISA also extends to every covered employee benefit plan the requirement that the assets of the plan "shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan" (Section 403 (c)(1), 29 U.S.C. § 1101(c)(1)). And to emphasize this requirement, ERISA provides that a fiduciary of a covered plan "shall discharge his duties with respect to a plan *solely* in the interest of the participants and beneficiaries and (A) for the *exclusive* purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; . . . and (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I]." (Section 404(a)(1), 29 U.S.C. § 1104(a)(1)).

The plain meaning of these provisions is that money contributed by employers to an employee benefit plan covered by ERISA must be used for the purposes provided in the plan and cannot be diverted to other purposes, either by requirements of State law or by other means. And where requirements of State law are concerned, ERISA is em-

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[2]Committee Print, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974, Public Law 93-406.

phatic that with limited exceptions, none of which are pertinent here, such requirements are superseded insofar as they may now or hereafter relate to a covered plan (Section 514(a), 29 U.S.C. § 1144(a)).

In pressing its argument that "[t]here is no section of ERISA which prohibits the Board from levying on a welfare or vacation fund" (Brief of Appellant, p. 32), Appellant Board ignores one of the basic grounds for this Court's decision in *Alessi v. Raybestos-Manhattan, Inc.* (1981) 451 U.S. 504. There the Court said (pp. 525-526):

> "Another consideration bolsters our conclusion that the New Jersey provision is preempted insofar as it bears on pensions regulated by ERISA. ERISA leaves integration, along with other pension calculation techniques, subject to the discretion of pension plan designers. See *supra,* at 1903-1905. Where, as here, the pension plans emerge from collective bargaining, the additional federal interest in precluding state interference with labor-management negotiations calls for preemption of state efforts to regulate pension terms. See *Teamsters v. Oliver,* 358 U.S. 283, 296, 79 S.Ct. 297, 304, 3 L.Ed. 2d 312 (1959). **As a subject of collective bargaining, pension terms themselves become expressions of federal law, requiring preemption of intrusive state law.**[23]"

In footnote 23, the Court said (p. 526):

> "23. This conclusion follows naturally from the view of a plurality of this Court in *Malone v. White Motor Corp.,* 435 U.S. 497, 98 S.Ct. 1185, 55 L.Ed. 443 (1978). There, because Congress preserved a state role in pension regulation before ERISA, the plurality created an exception to the general rule preempting state regulation of collective bargaining. Id, at 513-514, 98 S.Ct. at 1194-1195. **This exception no longer applies, however, now that ERISA, with express preemptive intent, has eliminated state regulations of most pension plans.**"

The Court has not confined its holding in *Alessi* to *pension* trusts, as Appellant suggests (Br., p. 34). In *United Mine Workers of America Health and Retirement Funds v. Robinson* (1982) 455 U.S. 562, which involved an employee *welfare* benefit plan, the Court said (pp. 573-575):

> "The petitioner trustees were not given 'full authority' to determine eligibility requirements and benefit levels, for these were fixed by the 1974 collective bargaining agreement. By the terms of the trust created by that agreement, the trustees are obligated to enforce these determinations unless modification is required to comply with applicable *federal* law . . . . Absent conflict with *federal* law, then, the trustees breached no fiduciary duties in administering the 1950 Benefit Trust in accordance with the terms established in the 1974 collective bargaining agreement.
>
> • • • • •
>
> "The substantive terms of jointly administered employee benefit plans must comply with the detailed and comprehensive standards of the ERISA . . . **But where neither the collective bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective bargaining contract.**"

The anti-alienation provisions of the trust agreement establishing the Appellee Fund were included in the agreement to assure compliance with the direction of Congress that money contributed by employers to collectively bargained trust funds to provide vacation and holiday benefits for their employees must be used for the sole and exclusive benefit of such employees, their families and dependents, and solely for vacation and holiday purposes (see *supra.*, p. 10). Thus, in the words of this Court in *Alessi*, such provisions are "expressions of federal law, requiring preemption of intrusive state law."

The intrusive nature of state law where vacation benefit plans governed by ERISA are concerned is illustrated by the California Employees' Earnings Protection law (California Code of Civil Procedure, §§ 723.010-723.154, revised effective July 1, 1983, as §§ 706.010-706.154).

Under California law, and under the trust agreements establishing the Appellee Fund and the Northern California Funds, vacation benefits are "additional wages for services performed (*Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, 779, 647 P.2d 122; see *Associated Builders & Contractors v. Carpenters Vacation and Holiday Trust Fund for Northern California, supra,* filed opinion, p. 10).

The California Employees' Earning Protection Law provides that except as provided in Section 4701 of the Civil Code [dealing with a wage assignment for support], the earnings of an employee shall not be required to be withheld by an employer for payment of a debt by means of any judicial procedure other than pursuant to that law (California Code of Civil Procedure § 723.020; revised § 706.020) and defines the term "employer" as meaning "a person for whom an individual performs services as an employee" (*ibid* § 723.011(c); revised § 706.011(c)). The law provides that no levy upon earnings of an employee held by an employer is effective unless such levy is made in accordance with the provision of the law (*ibid* § 723.071; revised § 706.071); provides that a withholding order for taxes may only be issued under specified circumstances (*ibid* § 723.072(b); revised § 706.072(b)); requires that within ten days after service of the order, the employer deliver to the taxpayer a copy of the order, and a notice in a form provided by the state advising the taxpayer of the effect of the order and of his right to hearings and other remedies under the law (*ibid* § 723.075(b); revised § 706.075(b)); and provides that while the employer is not

subject to any civil liability for a failure to deliver the required documents to the taxpayer, nothing in the law limits the power of a court to hold the employer in contempt of court for such failure (*ibid* § 723.075(d); revised § 706.075(d)).

While the administrator of an ERISA vacation benefit plan would not seem to qualify as an "employer" within the definition of that term as used in the California Employees' Earnings Protection Law, a California court might hold that the plain words of the statute are not sufficient to exclude such administrator from its requirements (*cf. Stone v. Stone* (9th C.A. 1980) 632 F.2d 740, at p. 743). Conversely, the administrator, if faced with the necessity of choosing between the restrictions on tax levies provided by the California law and no protection at all against such levies, might feel obligated as a fiduciary to claim the benefits of the law on behalf of the plan participants. We submit that the preemption provisions of ERISA were specifically intended by Congress to protect plan administrators against the necessity of choosing between the clear terms of an ERISA plan and the uncertain terms of a conflicting state law.

II

The cases ruling that ERISA does not preempt state domestic relations laws are in conflict with this Court's holding in Alessi and provide no support for Appellant's position on this appeal.

Appellant asserts that "[a]ll State laws cannot be preempted by ERISA because numerous courts have allowed levies authorized by State laws against pension funds and vacation funds when it was determined that this would further an important public purpose" (Br., p. 25). The only decision of this Court cited in support of this assertion is the Court's summary dismissal of the appeal in *In re Marriage of Campa* (1979) 89 Cal.App. 3d 113, 152 Cal.

Rptr. 362 for want of a substantial federal question ((1980) 444 U.S. 1028).

The summary action in *Campa*, however, does not have "the same authority in this Court as do decisions rendered after plenary consideration" (*Metromedia Inc. v. City of San Diego* (1981) 453 U.S. 490, 500). In *Campa* the California court expressly rejected the consideration which this Court found to be persuasive in *Alessi*, saying (89 Cal.App. 3d at pp. 126-127, 152 Cal.Rptr. at pp. 369-370):

> "The Fund next maintains that section 1144 of ERISA affirms the principle that provisions of collective bargaining agreements negotiated under the aegis of the National Labor Relations Act generally supersede conflicting state law. (E.g., Teamsters Union v. Oliver (1959) 358 U.S. 283 [3 L.Ed.2d 312, 79 S.Ct. 297].) **The pension plan here purports to prohibit the nonemployee spouse from obtaining any order or other process against the Fund.** This provision, the Fund urges, must prevail over contrary California law.
>
> "**This argument is untenable in the light of Malone v. White Motor Co.**, *supra*, 435 U.S. 497 [98 S.Ct. 1185]. There the court held that the Minnesota Private Benefit Protection Act was not preempted by the National Labor Relations Act. The Court noted that ' "We cannot declare preempted all local regulation that touches or concerns in any way the complex interrelationships between employees, employers and unions; obviously, much of this is left to the states." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289, 91 S.Ct. 1909, 1919, 29 L.Ed. 2d 473 (1971)' [..... U.S. at ....., 98 S.Ct. at p. 1190.] The court went on to say (*ibid.*): 'There is little doubt that under the federal statutes governing labor-management relations, an employer must bargain about wages, hours, and working conditions and that pension benefits are proper sub-

jects of compulsory bargaining. But there is nothing in the NLRA, including those sections on which appellee relies, which expressly forecloses all state regulatory power with respect to those issues, such as pension plans, that may be the subject of collective bargaining. If the Pension Act is preempted here, the congressional intent to do so must be *implied* from the relevant provisions of the labor statutes. We have concluded, however, that such implication should not be made here . . . .' (Emphasis in original.)

"An implication that Congress in the NLRA intended to abrogate community property and domestic relations laws which divide pensions between ex-spouses is even less warranted than the one unsuccessfully urged in *Malone*."

In *Alessi* this Court, after plenary consideration of the issues involved, expressly and in unmistakable terms rejected the interpretation of *Malone v. White Motor Co.* which the California court found to be controlling, thereby destroying whatever authority its summary action in *Campa* might have had on this appeal.

The decisions of the Ninth Circuit in *Stone v. Stone* (9th C.A. 1980) 632 F.2d 740, *cert. den.* (1981) 453 U.S. 922, and *Carpenters Pension Trust for Southern California v. Kronschnabel* (9th C.A. 1980) 632 F.2d 745, *cert. den.* (1981) 453 U.S. 922, are flawed by their reliance without critical analysis upon the *compulsion* of the summary action in *Campa*. The extent of this reliance, and of its uncritical nature, has been recently emphasized by the Ninth Circuit in its decision in *Board of Trustees of Carpenter Pension Trust Fund for Northern California v. Reyes* (9th C.A. 1982) 688 F.2d 671, where the Court said (pp. 674-675):

"In Stone, we held that a nonemployee ex-spouse such as Toni, was a participant within the meaning of

ERISA, 29 U.S.C. § 1132(a)(1)(B). This statute provides:

> (a) A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> * * * * * *
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan. . . .

Id.

This conclusion was based upon the Supreme Court's summary dismissal of the appeal in *In re Marriage of Campa,* 444 U.S. 1028, 100 S.Ct. 696, 62 L.Ed.2d 664 (1980), for want of a federal question, *see Stone v. Stone,* 632 F.2d at 742. The effect of the court's summary dismissal of *In re Marriage of Campa,* 89 Cal. App.3d 113, 152 Cal.Rptr. 362 (1979), acted as a decision on the merits that is controlling on lower federal courts. *See Carpenters Pension Trust v. Kronschnabel,* 632 F.2d 745, 748 (1980) (citing, inter alia, *Hicks v. Miranda,* 422 U.S. 332, 344, 95 S.Ct. 2281, 2289, 45 L. Ed.2d 223 (1975)). Thus, the summary dismissal established that ERISA does not preempt a state's community property law as it relates to the payment of pension fund benefits. *See Kronschnabel,* 632 F.2d at 748. We concluded in *Stone,* that if ERISA permits the transfer of an employee's pension benefit rights to an ex-spouse pursuant to state community property law, then it impliedly authorizes an ex-spouse to enforce these rights pursuant to 29 U.S.C. § 1132(a)(1)(B). *See* 632 F.2d at 743. **It follows from Stone that if the non-employee ex-spouse is able to enforce his or her rights as a participant, he or she is permitted as a participant seeking to enforce these rights, the award of attorney's fees under 29 U.S.C. § 1132(g).**

The Fund seeks to cast doubt on the validity of the rationale upon which *Stone* and *Kronschnabel* are based because of the reliance placed on *Campa*. The Fund argues that we are bound by the Supreme Court's summary dismissal in *Campa* only until "'doctrinal developments indicate otherwise.'" [Citations]

Recent Supreme Court cases such as *Ridgway v. Ridgway*, 454 U.S. 46, 102 S.Ct. 49, 70 L.Ed.2d 39 (1981), *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981), and *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed. 2d 402 (1981) are, according to the Fund, doctrinal developments indicating that the ERISA does preempt community property law as it relates to pension funds. None of these cases, however presents the issue of whether a state's community property law is preempted by ERISA. Two of the cases address the issue of whether state community property laws are preempted by other federal statutes: *Ridgway* involved the preemption of state community property laws by the Servicemen's Group Life Insurance Act of 1965, 38 U.S.C. §§ 765-779; *McCarty* involved the issue of whether state community property laws are preempted by federal law concerning military non-disability retirement pay, 101 S.Ct. at 2730. *Alessi* on the other hand, involves ERISA but not state community property law. 101 S.Ct. at 1898 (court addressed issue of whether ERISA preempted state law prohibiting offset of workers' compensation awards). **Because these cases do not address whether ERISA acts to preempt state community property law we are compelled to follow Campa. We hold that attorney's fees may properly be awarded in the matter before us pursuant to ERISA, 29 U.S.C. § 1132(g).**

We are cognizant of the fact that there are many questions, yet unresolved by the Supreme Court which

result from the interplay between the law of community property and the provisions of ERISA. **Review of these important issues by the United States Supreme Court would greatly assist fund administrators in meeting their responsibilities.** *See, e.g., United States v. Ross,* ..... U.S. ....., ..., 102 S.Ct. 2157, 2162, 72 L.Ed.2d 572 (1982)."

The appellant in *Reyes* filed a timely petition for rehearing and a suggestion that the rehearing be en banc. By an order filed March 9, 1983, the Court denied the petition and rejected the suggestion that the rehearing be en banc, saying:

"The cases cited by petitioner, *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California,* 679 F.2d 1307 (9th Cir. 1982) and *Alessi v. Raybestos-Manhattan, Inc.* 451 U.S. 504 (1981) are inapposite. **Neither case deals with an attempt by the state to apply community property law to pension funds.** As pointed out in the *Reyes* opinion, we are **bound** by the summary dismissal of *In re Marriage of Campa,* 444 U.S. 1028 (1980). See *Stone v. Stone,* 632 F.2d 740, 742 (9th Cir. 1980); *Carpenters Pension Trust v. Kronschnabel,* 632 F.2d 745, 748 (9th Cir. 1980). **Petitioner's arguments based on Alessi should be addressed to the Supreme Court, not this Court."**

Notwithstanding this order, we are at a loss to understand how the majority of the panel in the *Franchise Tax Board* case could consider *Alessi,* which addressed the "issue of whether ERISA preempted state law prohibiting offset of workers' compensation awards" (see *supra,* p. 19) gave it "no choice" but to hold that ERISA preempted California's attempt to levy on a vacation trust for unpaid taxes, whereas the panel in *Reyes,* without discussing or

analyzing what this Court said in *Alessi,* found both *Franchise Tax Board* and *Alessi,* "inapposite" to a determination of the issue of "whether ERISA acts to preempt state community property law." It is apparent that the *Reyes* panel believes that this Court should address the latter issue, unencumbered by any reasoned analysis by the Ninth Circuit of *Alessi's* impact upon *Campa,* and by denying a rehearing it has provided the opportunity for the appellant in that case to seek such review. We submit, however, that the absence of reasoned analysis and the continued reliance upon the compulsion of *Campa* detracts from the authority of *Stone* and *Kronschnabel* and now *Reyes.*

The domestic relations law decisions cited by Appellant are leading plan fiduciaries, participants and beneficiaries, and the federal courts, deeper and deeper into a dense thicket from which they will be extricated with difficulty and which will inevitably result in injury and loss to the persons and entities affected. The matter was succinctly expressed by Representative Erlenborn while introducing in the House of Representatives a bill entitled "The Retirement Income Incentives and Administrative Simplification Act of 1981 (H.R. 4330)," when he said (Cong. Rec.-House, July 30, 1981, p. H-5424):

> "Currently, courts are ignoring ERISA's preemption of State law with respect to community property laws and alimony and support decrees. Plans which obey court orders to pay benefits in violation of ERISA's prohibitions against assignment and alienation may be placed in tax jeopardy or found to be in violation of plan provisions."

CONCLUSION

Congress, in enacting ERISA, concluded that with the exception of the Welfare and Pension Plans Disclosure Act, the provisions of ERISA should not affect existing federal law (Section 514(d), 29 U.S.C. § 1144(d)). It came to the opposite conclusion as to state law and determined that with a few carefully limited exceptions, the provisions of ERISA should supersede that law as it relates to ERISA plans. If this decision is to be reversed or modified as to State levies on vacation and holiday benefits, the reversal or modification must be by "congressional and not by judicial action" (*Local No. 2, etc. v. Paramount Plastering, Inc., supra*).

San Francisco, California,
March 17, 1983.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,

Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,

Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATE OF CONNECTICUT AND THE NEW YORK STATE DIVISION OF HUMAN RIGHTS, *AMICI CURIAE*

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BRIEF OF THE STATE OF CONNECTICUT AND THE NEW YORK STATE DIVISION OF HUMAN RIGHTS, *AMICI CURIAE*

Interests of the *Amici** and Summary of Argument

The State of Connecticut shares the interest of the Franchise Tax Board of California in the questions presented by this case:** (1) the extent to which the Em-

* The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of this Court pursuant to Rule 36.2 of the Rules of this Court.

** The decision below is reported at 679 F.2d 1307 (9th Cir. 1982).

ployee Retirement Income Security Act of 1974, P.L. 93-406, 29 U.S.C. §§ 1001-1461 ("ERISA") preempts state law and official action thereunder; (2) the extent to which claims of such preemption create a basis for "arising under" jurisdiction, see 28 U.S.C. §§ 1331, 1441; (3) the extent to which the Tenth Amendment limits preemption of state sovereign action or action under state police power.

Connecticut has brought these issues before this Court in *Arcudi* v. *Stone & Webster Engineering Corp.*, No. 82-1085, appeal docketed Dec. 23, 1982, but because that case may be moot or otherwise nonjusticiable, see Jurisdictional Statement therein at 4 ff., this case, to the extent it is not affected by the amendment of ERISA's preemption clause to exempt certain multiemployer welfare plans, see P.L. 97-473, signed into law Jan. 14, 1983, of which the trust here may be an example, may prove controlling in future litigation under ERISA as to Connecticut statutes.

The New York State Division of Human Rights, the nation's oldest fair employment agency, was created in 1945 in exercise of the state's police power and in fulfillment of the provisions of the Constitution of the State of New York, N.Y. Const. Art. I § 11, concerning civil rights. L. 1945 ch. 118. The Division protects workers from discrimination based on race, creed, color, national origin, age, sex, disability, marital status, cleared arrests, and certain types of criminal conviction. The opportunity to obtain employment without such discrimination is a civil right. N.Y. Executive Law, Art. 15 (known as the Human Rights Law) § 291.1 (McKinney 1982).

The Division has an interest in the first two questions enumerated above. Since the enactment of ERISA, the

Division has been named a defendant in approximately eight federal actions seeking declarations that ERISA preempts the Human Rights Law. An appeal in three of these actions—*Shaw* v. *Delta Air Lines, Inc.*, *Shaw* v. *Burroughs Corp.* and *Shaw* v. *Metropolitan Life Ins. Co.*, No. 81-1578 (*"Delta"*)—argued in this Court on January 10, 1983, appears moot or otherwise nonjusticiable,* and may not reach the questions here, which affect the Division's posture in actions still pending in the lower federal courts and its efforts to enforce the Human Rights Law.

The *amici* argue *infra* that claims of preemption by ERISA asserted to bar enforcement of state legislation are defensive, and do not confer "arising under" jurisdiction. The *amici* also argue that the preemptive force of ERISA is not co-extensive with the statute but explicitly confined to specific provisions. In the context of this case, those provisions may regulate fiduciary administration of welfare plans to the exclusion of state statutes regulating such administration, but do not supersede extraneous state laws.

Reversal or vacatur of the decision below would discourage premature federal intervention in state law questions; would support a construction of ERISA's preemption clause which is consistent with the statute's regulatory grasp and the purposes and concerns prompting its enactment; and would facilitate enforcement of state legislation

* Pending action by counsel of record on requests for the filing of a formal suggestion of mootness, the Division submitted a letter to the Clerk of this Court on December 2, 1982 suggesting that *Delta* was moot by virtue of a change in statutory law, see P.L. 95-555, 42 U.S.C. § 2000e-(k) (1978). The Division had attempted to question the "arising under" jurisdiction of the courts below through a motion for divided argument and leave to file a separate brief. The motion was denied. 73 L.Ed.2d 1400 (1982).

which this Court has recognized to be peripheral to ERISA. See *Minnesota Mining & Mfg. Co.* v. *Minnesota*, 444 U.S. 1041 (1980), *dismissing appeal from* 289 N.W.2d 396 (Minn. 1979); *Mountain States Tel. & Tel. Co.* v. *Commissioner*, 445 U.S. 921 (1980), *dismissing appeal from* 608 P.2d 1047 (Mont. 1979); *United Federation of Teachers Welfare Fund* v. *State Human Rights Appeal Board*, 449 U.S. 803 (1980). All these results would serve the interests of the *amici*.

Affirmance, on the other hand, would rewrite the rules of "arising under" jurisdiction to permit earlier federal intervention, and would stretch ERISA's preemptive effect beyond its regulatory grasp, thus hindering enforcement of state policies consistent and coequal in value with the policies expressed in ERISA.

POINT I

The Federal Courts Below Did Not Acquire Jurisdiction.

This case was begun in a California court by an agency of California against a California-based vacation trust to enforce and seek monetary and declaratory remedies under California statutes. The agency sought to make the trust apply trust assets to state tax claims against three beneficiaries.

There being no diversity of parties, the only ground for removal was the trust's claim that the case arose under ERISA. See 28 U.S.C. § 1441(b). The trust based its claim on its status as an ERISA-covered employee benefit plan and on references to ERISA in the complaint.

The test for ascertaining "arising under" jurisdiction is whether the well-pleaded complaint presents on its face a substantial claim founded directly upon federal law. See 13 Wright & Miller, *Federal Practice and Procedure* § 3566 (1975) ("*Wright & Miller*"); American Law Institute, *Study of the Division of Jurisdiction between State and Federal Courts* 169 ff., 478-79 (1969) ("*ALI Study*").

This case does not meet that test. The references to ERISA in the complaint do not confer "arising under" jurisdiction, because they are not essential to the pleading of the California agency's claim under state law, but anticipate the defense put forward by the trust: that ERISA preempts the California statutes invoked in the complaint.

When the only federal issue in a case is whether a federal law bars a state claim set forth in the complaint, the case can neither be brought in federal court by the plaintiff nor removed to federal court by the defendant. *Tennessee* v. *Union and Planters' Bank*, 152 U.S. 454 (1894); see *Gully* v. *First Nat. Bank in Meridian*, 299 U.S. 109 (1936); *ALI Study* at 478-79. Allegations by the plaintiff which anticipate a defense available to the defendant under federal law do not offer a basis for removal.* *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950); *Louisville & Nashville R.R. Co.* v. *Mottley*, 211 U.S. 149 (1908); 14 *Wright & Miller* § 3721.

The prayer of the California agency for declaratory as well as monetary relief did not convert from state law to

* A different rule could create a "Catch-22" situation for a plaintiff who is required by state law to anticipate a defense, or who tries, consistently with modern theories of pleading, to tell the state court what the dispute is all about.

federal law the basis of the complaint. The agency did not assert a right based directly on ERISA, but instead challenged the trust's arguable immunity under ERISA. The distinction is crucial, see 10 *Wright & Miller* § 2767 at 844-49, under decisions of this Court. In *Skelly Oil Co.* v. *Phillips Petroleum Co., supra* at 673-74, this Court stated, Frankfurter, J., it would "distort the limited procedural purpose of the Declaratory Judgment Act" to permit a party by "artful pleading" to anticipate a defense based on federal law and thus to bring within federal jurisdiction a case that could not otherwise have been heard in a federal court. See also *Public Service Comm. of Utah* v. *Wycoff Co., Inc.*, 344 U.S. 237, 246-48 (1952). If a plaintiff's allegations as to a possible defense of immunity do not afford original "arising under" jurisdiction, they cannot sustain "arising under" jurisdiction by way of removal.*

Moreover, since the jurisdiction of federal courts is not enlarged by the federal declaratory remedy, 28 U.S.C. §§ 2201, 2202, see, *e.g.*, *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 325 (1936); *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 239-41 (193[illegible]) federal jurisdiction was not enlarged by the California agency's invocation of California's declaratory remedy.

Even should this Court now wish to broaden opportunities for removal by repudiating the well-pleaded complaint rule, this case is not the appropriate vehicle. The claim of the California agency is inseparable from enforce-

* Some writers have recommended that a defense based on federal law should afford "arising under" jurisdiction, see, *e.g.*, *ALI Study* 168, 171, 191 ff.; Chadbourn & Levin, "Original Jurisdiction of Federal Questions", 90 *U. Pa. L. Rev.* 639 (1942), but this recommendation presupposes Congressional action. See *ALI Study, passim;* Chadbourn & Levin, *op. cit. supra* at 674.

ment of California laws as to collection of taxes, a state function largely beyond the reach of the lower federal courts. See U.S. Const. Amend. X, XI. This Court should not approve an exercise of removal jurisdiction which enables those courts to thwart indirectly activity they are forbidden to enjoin directly. See 28 U.S.C. § 1341. The immunity claimed by the trust under ERISA, disputed in Point II *infra*, cannot be assumed to limit California's historical and constitutional immunity to interference with essential state functions.

POINT II

ERISA's Provisions for Preemption Do Not Afford Immunity from Claims of Creditors.

ERISA regulates two basic types of employee benefit or "welfare plans".* The trust in this case is a welfare plan.

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* "Sec. 3. For purposes of this title:

(1) The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)." Title I § 3(1), 29 U.S.C. § 1002(1).

The reference to benefits described in Section 302 of the Labor Management Relations Act of 1947, 29 U.S.C. § 186(c) (1978), in-

(footnote continued on next page)

Pension plans are regulated or affected by all four titles of ERISA. Welfare plans are regulated only by Parts 1, 4 and 5 of Title I.

ERISA does not require any employer or union to establish a welfare plan,* but requires those that do to meet the purely regulatory standards in Parts 1, 4 and 5 of Title I. Welfare plans, like pension plans, must meet requirements as to reporting and disclosure, §§ 101-111, 29 U.S.C. §§ 1021-1031, and fiduciary responsibility, §§ 401-414, 29 U.S.C.**

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corporates exceptions to the restrictions imposed by that Act on payments by an employer to representatives of employees. See Creed, *ERISA Compliance Reporting and Disclosure* 15 (1981).

> "Some guidance is provided by the regulations issued under ERISA by the DOL as to the meaning of the statutory reference to LMRA. Basically, the position of DOL is that all the reference to LMRA adds to the definition of 'welfare plan' is the inclusion of holiday and severance benefits and similar programs. All other references in LMRA § 302(c) either duplicate benefits described in ERISA § 3(a)(A) or describe benefits which are not provided through employee benefit plans." *Id.*, citing 29 C.F.R. § 2510.3-1(a)(3) (1979).

* Some welfare plans are exempt from regulation: governmental plans (including plans of certain international organizations), certain church plans, plans "maintained solely for the purpose of complying with applicable workmen's compensation laws or unemployment compensation or disability insurance laws," Title I § 4(b)(3); 29 U.S.C. § 1003(b)(3), and unfunded plans which provide benefits or contributions in excess of those allowable for tax-qualified plans.

** The fiduciary must act solely in the interest of the participants and beneficiaries and for the exclusive purpose of providing benefits to them and defraying reasonable expenses of administering the plan. Title I §§ 404(a)(1) and (A), 29 U.S.C. §§ 1104(a)(1) and (A). Title I codifies the "prudent man" rule deriving from the common law of trusts. See 1 Restatement of Trusts 2d § 174 (1959); King v. Talbot, 40 N.Y. 76, 86-87 (1869); Harvard College v. Amory, 9 Pick. 446, 461 (Mass. 1830).

In order to prevent conflicts of interest, fiduciaries are barred from certain transactions, § 406, 29 U.S.C. § 1106, subject to numerous exceptions, § 408(b), 29 U.S.C. § 1108(b).

(footnote continued on next page)

§§ 1101-1114, and are covered by provisions as to administration and enforcement, §§ 501-514, 29 U.S.C. §§ 1131-1144. Unlike pension plans, welfare plans are excluded from provisions as to vesting, §§ 201-211, 29 U.S.C. §§1051-1061, inalienability of benefits, § 206(d)(1), 29 U.S.C. § 1056(d)(1), and funding, §§ 301-306, 29 U.S.C. §§ 1081-1086.

ERISA imposes duties of reporting and disclosure upon welfare plans, holds their trustees to standards of responsibility, and provides means of statutory enforcement. As to welfare plans, in sum, ERISA is fiduciary legislation, regulating the behavior of trustees and administrators, but not distribution of benefits or payments from plan assets.

Some of the fiduciary provisions are not yet effective, the effective dates ranging from January 1, 1975 to December 31, 1984. § 414, 29 U.S.C. § 1114. Regulations permit applications for postponement of the effective date of certain provisions as to fiduciary responsibility; see 29 C.F.R. §§ 2550.4146-1ff.

Part 5 of Title I provides criminal penalties for a violation of any provision as to reporting and disclosure, § 501, 29 U.S.C. § 1131, and enables participants and fiduciaries to redress their rights or enjoin statutory violations through civil actions. § 502, 29 U.S.C. § 1132. Any plan can sue or be sued under ERISA as an entity. § 502(d), 29 U.S.C. § 1132(d).

Title I forbids any person to discharge, fine, suspend, expel, discipline or discriminate against a participant or beneficiary for exercising any right under the plan or under ERISA or its predecessor statute, or to interfere with the attainment of any such right. §§ 510, 511, 29 U.S.C. §§ 1140, 1141.

Welfare plans are required to provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, and must afford a reasonable opportunity for full and fair review to any participant or beneficiary whose claim for benefits has been denied. § 503, 29 U.S.C. § 1133.

Title I confers investigative and rulemaking powers upon the Secretary of Labor, §§ 504, 505, 29 U.S.C. §§ 1134, 1135, and authorizes him to cooperate with other government agencies and utilize the services of federal and state agencies, § 506, 29 U.S.C. § 1136.

ERISA's preemption clause* is in four parts. Subsection (a) describes those portions of ERISA which exert

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* "(a) Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b). This section shall take effect on January 1, 1975.

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975.

(2)(A) Except as provided in subparagraph (B), nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.

(B) Neither an employee benefit plan described in section 4(a), which is not exempt under section 4(b) (other than a plan established primarily for the purpose of providing death benefits), nor any trust established under such a plan, shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

(3) Nothing in this section shall be construed to prohibit use by the Secretary of services or facilities of a State agency as permitted under section 506 of this Act.

(4) Subsection (a) shall not apply to any generally applicable criminal law of a State.

(5)(A) Except as provided in subparagraph (B), subsection (a) shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).

(B) Nothing in subparagraph (A) shall be construed to exempt from subsection (a)—

(i) any State tax law relating to employee benefit plans, or

(ii) any amendment of the Hawaii Prepaid Health Care Act enacted after September 2, 1974, to the extent it provides for more than the effective administration of such Act as in effect on such date.

(C) Notwithstanding subparagraph (A), parts 1 and 4 of this subtitle, and the preceding sections of this part to the extent

(footnote continued on next page)

preemptive force; subsections (a) and (c) describe the targets of such preemptive force; subsections (b) and (d) are savings clauses.

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they govern matters which are governed by the provisions of such parts 1 and 4, shall supersede the Hawaii Prepaid Health Care Act (as in effect on or after the date of the enactment of this paragraph), but the Secretary may enter into cooperative arrangements under paragraph and section 506 with officials of the State of Hawaii to assist them in effectuating the policies of provisions of such Act which are superseded by such parts.

(6)(A) Notwithstanding any other provision of this section—

(i) in the case of an employee welfare benefit plan which is a multiple employer welfare arrangement and is fully insured (or which is a multiple employer welfare arrangement subject to an exemption under subparagraph (B)), any law of any State which regulates insurance may apply to such arrangement to the extent that such law provides—

(I) standards, requiring the maintenance of specified levels of reserves and specified levels of contributions, which any such plan, or any trust established under such a plan, must meet in order to be considered under such law able to pay benefits in full when due, and

(II) provisions to enforce such standards, and

(ii) in the case of any other employee welfare benefit plan which is a multiple employer welfare arrangement, in addition to this title, any law of any State which regulates insurance may apply to the extent not inconsistent with the preceding sections of this title.

(B) The Secretary may, under regulations which may be prescribed by the Secretary, exempt from subparagraph (A)(ii), individually or by class, multiple employer welfare arrangements which are not fully insured. Any such exemption may be granted with respect to any arrangement or class of arrangements only if such arrangement or each arrangement which is a member of such class meets the requirements of section 3(1) and section 4 necessary to be considered an employee welfare benefit plan to which this title applies.

(C) Nothing in subparagraph (A) shall affect the manner or extent to which the provisions of this title apply to an employee welfare benefit plan which is not a multiple employer welfare arrangement and which is a plan, fund, or program partici-

(footnote continued on next page)

A. ERISA's preemptive force is not coextensive with the statute as a whole but is explicitly confined to certain regulatory provisions.

The preemption clause in ERISA is selective, not categorical. Only Titles I and IV are preemptive; Title IV has no application here. Because welfare plans are excluded from Parts 2 and 3 of Title I, regulating vesting and funding, see *supra* at 9, and thus from restrictions on alienability of benefits, § 206(d)(1), 29 U.S.C. § 1056(d)(1), the only provisions of ERISA exerting preemptive force in the context of this case are provisions in Title I regulating information, disclosure and fiduciary responsibility.

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pating in, subscribing to, or otherwise using a multiple employer welfare arrangement to fund or administer benefits to such plan's participants and beneficiaries.

(D) For purposes of this paragraph, a multiple employer welfare arrangement shall be considered fully insured only if the terms of the arrangement provide for benefits the amount of all of which the Secretary determines are guaranteed under a contract, or policy of insurance, issued by an insurance company, insurance service, or insurance organization, qualified to conduct business in a State.

(c) For purposes of this section:

(1) The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term 'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

(d) Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law." Title I § 514, 29 U.S.C. § 1144, as amended by P.L. 97-473 (1983).

Accordingly, the preemptive force of ERISA is narrower with respect to state laws relating to welfare plans than with respect to state laws relating to pension plans. A precedent acknowledging preemptive force in provisions of Title I applicable exclusively to pension plans does not decide the preemptive force of the provisions which apply to welfare plans. Contrary to the majority opinion below, see 679 F.2d at 1309, *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), does not provide the gauge appropriate here.

Alessi held a state statute preempted by ERISA because it eliminated one method of calculating pension benefits that Congress intended ERISA to preserve. It can be conceded that ERISA regulates methods of calculating pension benefits. See Title I Part 2, 29 U.S.C. §§ 1051-1061. But ERISA does not regulate the calculation of benefits under welfare plans. See Title I § 201, 29 U.S.C. § 1051. *Alessi* settled the preemptive effect of provisions in Title I dealing with pensions. *Alessi* had nothing to do with the preemptive effect of provisions applicable to welfare plans.

Therefore, *Alessi* does not control this case. Indeed, after noting varying decisions "as to the meaning of ERISA's preemptive language in other contexts," this Court refrained from comment, 451 U.S. at 525 n.21 (Marshall, J.), and did not decide ERISA's preemption of state laws different from the statute addressed.

Alessi measures the preemptive force of provisions in ERISA from which welfare plans are excluded. *Alessi* does not purport to measure ERISA's preemptive force over state laws relating to welfare plans, nor imply that ERISA

exerts identical preemptive force whatever the law or whatever the plan.

Alessi's declaration—

> "The only relevant state laws, or portions thereof, that survive this preemption provision are those relating to plans that are themselves exempted from ERISA's scope," 451 U.S. at 523 n.20—

must not be read out of context. *Alessi* analyzes provisions in ERISA and in a state law which relate to pension plans only. Even under the strictest construction, *Alessi's* footnote 20 in the context of this case does not hold ERISA to preempt laws regulating imposition and collection of state taxes.

In enacting ERISA, Congress deliberately refrained from regulating the design, content or distributive provisions of welfare plans or the rights of creditors to reach beneficial interests in such plans. Congress showed it did not intend to occupy that regulatory field to the exclusion of state laws regulating taxation. The provisions in ERISA applicable to pension plans are not relevant. Instead, the intent of Congress is found in the provisions applicable to welfare plans and the selective wording of the preemption clause. The boundaries of the field occupied by Congress in its regulation of welfare plans extend no further than the subject-matter of those provisions selectively declared preemptive: reporting and disclosure, fiduciary responsibility, administration and enforcement. With respect to welfare plans, Congress occupied, at most, the field of fiduciary responsibility. Congress in enacting ERISA did not occupy the field of distribution or pay-out of money by welfare

plans. It is only "the provisions" of Title I which are declared preemptive as to welfare plans, § 514(a), 29 U.S.C. § 1144(a), not the existence of ERISA as a whole.

The preemption clause, therefore, does not delineate a zone of preemptive Congressional silence extending beyond the provisions in Title I explicitly regulating welfare plans. ERISA's preemptive reach does not exceed its regulatory grasp.*

B. The targets of ERISA's preemptive force are limited and specific.

Congress was selective not only in singling out certain provisions of ERISA as exerting preemptive force, but also in identifying their targets. "Any and all state laws" are declared preempted, § 514(a), 29 U.S.C. § 1144(a), but only if the state law may now or hereafter "relate to" an employee benefit plan covered by ERISA. *Id.*

The word "state", moreover, is defined with reference to an instrumentality which "purports to regulate directly or indirectly" the terms and conditions of an ERISA-covered plan. § 514(c), 29 U.S.C. § 1144(c).

This definition resolves the ambiguity in the vague words "relate to". The relationship which is the concern of ERISA's preemption clause is a regulatory relationship. When a state agency seeks to enforce a state law of general applicability, such as a tax law or a statute prohibiting un-

* This conclusion finds support also in ERISA's legislative history. Senator Javits declared that "State laws compelling disclosure . . . imposing fiduciary requirements . . . imposing criminal penalties on failure to contribute to plans—unless a criminal statute of general application . . ." would be preempted. 120 *Cong. Rec.* 29,942 (1974).

lawful discriminatory practices, analysis begins with the question whether the law or the state agency is purporting to regulate the terms and conditions of an employee benefit plan covered by ERISA. The target of preemption is not state law or state action as such but state regulatory law and state regulatory action.

Moreover, because ERISA's preemptive reach does not exceed its regulatory grasp, when a welfare plan rather than a pension plan is involved, the statutory terms "relate to" and "purport to regulate" refer to regulation of reporting, disclosure, fiduciary responsibility and administrative matters regulated by Title I, but do not include regulation of matters not regulated by Title I.

ERISA confers on welfare plans and their fiduciaries no rights or immunities as to claims of creditors on plan assets. Thus, ERISA has nothing to do with the rights of creditors to reach beneficial interests under welfare plans. That remains a matter of state law.

The targets of preemption, therefore, are laws, regulations, rules and orders which are regulatory as to the subject-matter regulated by ERISA. Because ERISA does not regulate the vesting or funding of welfare plans, and places no restrictions on assignment or alienation of benefits under such plans, or on rights of creditors, state laws on such subject-matter offer no preemptive target. Instead, ERISA preempts as to such plans only state laws which regulate reporting, disclosure, fiduciary responsibility and administrative matters regulated by ERISA itself.

C. The action of the California agency offers no target for the preemption clause of ERISA.

The efforts of the California agency to satisfy from trust assets state tax claims against three trust beneficiaries did not "purport to regulate", see § 514(c), 29 U.S.C. § 1144(c), either the terms and conditions of the trust or any matter regulated by provisions in ERISA's Title I applicable to welfare plans. The trust, its terms and conditions, its administration and the responsibilities of its fiduciaries remain the same regardless of those efforts and whatever their outcome.

The trust by its terms provides that California law shall control, together with "pertinent laws of the United States," Agreement and Declaration of Trust § 7.12, see Joint Appendix at 41, and exempts trust assets from the claims of creditors only insofar as "permissible by law", § 4.06, see Joint Appendix at 17.

The trust agreement thus incorporates by reference the state laws relied on by the California agency in attempting garnishment. Invocation of those laws worked no change in preexisting terms and conditions of the trust and introduced no additional layer of regulation. The terms and conditions of the trust were written in a way that permitted the agency's action.

Nor did the agency's action change any ERISA-regulated powers or duties of the trustees. Their fiduciary responsibilities and their administration of the trust remained the same. ERISA requires plan fiduciaries to administer the plan in accordance with consistent plan

documents. § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). The action of the California agency was consistent with the plan documents of the trust, and these in turn are consistent with ERISA.

The California agency acted to enforce state law dealing with state taxes. The agency did not attempt to regulate the terms and conditions of a welfare plan. The state's concern here—satisfaction of tax claims against delinquent workers—is essentially collateral to the concerns of ERISA for reporting and full disclosure, fiduciary responsibility and fiduciary administration of welfare plans. The California agency acted against the trustees in a manner unrelated to ERISA's regulatory scheme.

Indeed, the action of the California agency in enforcing state tax laws, while only peripheral to ERISA, was essential to the functioning and continued existence of California as a state. See *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). To interpret the preemption clause of ERISA as a barrier to enforcement of tax claims raises hard questions under the Tenth Amendment. Such an interpretation is at odds with language in ERISA and with traditional principles of Federalism.

Conclusion

For the reasons stated, the judgment of the court below should be vacated with directions for remand of the action to the state court.

Dated: February 10, 1983

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

v.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE ERISA INDUSTRY COMMITTEE (ERIC) IN SUPPORT OF APPELLEES

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In The

Supreme Court of the United States

October Term, 1982

No. 82-695

Franchise Tax Board of the State of California,
Appellant,

v.

Construction Laborers Vacation Trust for Southern California, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICUS CURIAE OF THE ERISA INDUSTRY COMMITTEE (ERIC) IN SUPPORT OF APPELLEES

INTEREST OF THE AMICUS CURIAE

The ERISA Industry Committee submits this brief with the written consent of the parties pursuant to Supreme Court Rule No. 36.2.

The ERISA Industry Committee (ERIC) is a nonprofit corporation whose members constitute an association of more than 100 major companies, all of whom maintain benefit plans for their employees. ERIC members represent a wide cross section of American business; the benefit plans of these members are numerous and varied, and, in all, cover millions of participants. Through ERIC, member companies coordinate their views and provide practical information and recommendations

to government on how the private benefit plan system functions and the impact on plan sponsors and participants of government regulations and interpretations under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*

In the instant case, the California Franchise Tax Board, invoking the state revenue law,[1] served notices directing the trustees of an ERISA-regulated employee benefit plan, the Construction Laborers Vacation Trust, to withhold and transmit to the Board funds due certain participants in the plan. The Board contended that these participants had failed to satisfy their state income tax liabilities. The trustees refused to comply with the Board's notices, relying on an advisory opinion issued by the Administrator, Pension and Welfare Benefit Programs, U.S. Department of Labor, which concluded "that the process of any state judicial or administrative agency seeking to levy for unpaid taxes . . . upon benefits due a participant or beneficiary under the Plan is pre-empted under ERISA section 514 [29 U.S.C. § 1144]."[2] The Tax Board thereupon brought suit against the plan and its trustees in Superior Court of the State of California (Los Angeles) seeking damages in the amount of its levies against the trust, plus interest, as well as a declaratory judgment that "defendants [are] legally obligated to honor all future levies by the Board upon defendant Trust Fund in collection of tax delinquencies of the beneficiaries of defendant Trust Fund. . ."[3]

The defendants removed the action to the United States District Court for the Central District of California. The

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[1] California Revenue and Taxation Code, § 18817.

[2] The full text of the Department of Labor's advisory opinion is set forth at pp. 25-27 of Appendix A (Exhibit H) of Motion Of Appellees To Dismiss Appeal Or In The Alternative To Affirm The Decision Below, filed in this Court on November 18, 1982 (hereinafter "Appellees' Motion of 11/18/82").

[3] Appellees' Motion of 11/18/82, Appendix A.

district court denied the Tax Board's motion to remand the case back to the state court, but granted summary judgment in favor of the Board on the merits. The district court held that ERISA does not preempt the Board from levying on the vacation trust fund benefits at issue.[4]

A panel of the U.S. Court of Appeals for the Ninth Circuit, with one judge dissenting, reversed the district court on the preemption issue in a decision officially reported at 679 F.2d 1307. The majority observed that "the state has not identified a legal basis to warrant a retreat from preemption"and "Congress has not left us at liberty to construe preemption as the state would have us construe it." 679 F.2d at 1309. The majority referred only briefly to the propriety of the removal of the action from state to federal court, noting that "[t]he trust has raised a federal question under ERISA" (679 F.2d at 1308, n.1); the dissenting judge, however, expressed "doubt that the district court possessed subject-matter jurisdiction over this action." 679 F.2d 1309.[5]

ERIC has a vital interest in ERISA's preemption provision because its members are large, multi-state employers, many of whom do business in all fifty states. They are therefore concerned that any erosion of that provision will subject their benefit plans to burdensome and costly state and local regulation and/or state and local judicial and administrative proceedings, will severely hamper

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[4] The judgment, findings of fact, and conclusions of law of the district court are not officially reported, but are set forth as Appendices B and C of Appellant's Jurisdictional Statement.

[5] Although the Tax Board complained in its Petition for Rehearing (Appellant's Jurisdictional Statement, Appendix E) that "the majority opinion has overlooked the issue of whether the federal court has jurisdiction of this matter," the Board conceded that "[t]he issue was not previously raised in this appeal . . ." The Petition for Rehearing was denied by the Court of Appeals in a brief order without opinion. (Appellant's Jurisdictional Statement, Appendix D).

their efforts to maintain uniform and equitable benefits for their workforces, and will infringe on their ability to engage in free collective bargaining on benefits with unions representing their employees. ERIC thus filed a brief *amicus curiae* in *Buczynski v. General Motors*, 451 U.S. 504 (1981), a companion case to and decided by the same opinion as *Alessi v. Raybestos-Manhattan, Inc.*, in which it supported the position, ultimately sustained by this Court, that a New Jersey statute which prohibited pension plans from reducing retirement benefits by amounts equal to state workers' compensation awards was preempted by ERISA. More recently, ERIC filed a brief *amicus curiae* in *Kramarsky v. Delta Air Lines*, No. 81-1578, argued on January 10, 1983 and awaiting decision. In that case, ERIC urged this Court to sustain the Second Circuit's decision[6] that ERISA preempts a New York civil rights statute which has been construed by the New York courts to require that employee benefit plans provide coverage for disability due to pregnancy on the same basis on which other disabling conditions are covered. ERIC has likewise appeared as *amicus* in cases before the courts of appeals involving the preemptive scope of ERISA. *E.g.*, *Stone v. Stone*, 632 F.2d 740 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981); *Wadsworth v. Whaland*, 562 F.2d 70 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978).

The instant case offers another variant in the pattern of cases in which the broad preemptive language of § 514(a) of ERISA is challenged. But here there is a threshold issue of jurisdiction as well. That issue is important to ERIC members because ready access to the federal courts is necessary to ensure that ERISA § 514(a) is given the full meaning and effect intended by Congress. If ERISA preemption questions cannot be removed from state to federal courts, authoritative resolution of those

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[6] *Delta Air Lines, Inc. v. Kramarsky*, 650 F.2d 1287 (2nd Cir. 1981), *opinion on rehearing*, 666 F.2d 21 (1981).

questions is postponed or even avoided, and plan sponsors, administrators and trustees are uncertain of their obligations. Indeed, they may be faced with conflicting obligations, as, for example, might well have occurred in this case if the trustees had been ordered by a state court to take an action—transmitting funds in their custody to the Tax Board pursuant to the Board's garnishment notices—which the U.S. Department of Labor had advised was barred by ERISA and which could subject the trustees to personal liability.

With respect to the merits of the preemption issue in this case, like other such cases arising under ERISA the state can advance strong policy arguments for doing what it seeks to do. And, as in other cases, the assertion may be made that the particular state action will result in mere inconvenience and minor expense to plans and their administrators and trustees. ERIC, however, urges that these arguments and assertions are beside the point. We submit that Congress rejected an approach which makes preemption of any particular state action depend on whether, on balance, the state's interest outweighs the burdens such action would place on benefit plans. Instead, Congress opted for a definitive and all encompassing rule favoring federal preemption. And it did so because of the inherent unpredictability of the case-by-case balancing approach and, even more important, because a potentially infinite variety of state actions, each of which can be justified on policy grounds and none of which is by itself excessively burdensome, can have an onerous cumulative impact which impedes the development of a sound private benefit plan system which Congress sought to foster.

Accordingly, the position of ERIC is that the decision of the court of appeals is correct and should be affirmed by this Court.

SUMMARY OF ARGUMENT

Pursuant to 28 U.S.C. § 1441(b), an action may be removed from state to federal court if it arises under the Constitution or the laws of the United States. Where, as in this case, it is obvious from the face of the complaint that the issue of whether ERISA preempts state action is basic to the dispute between the parties, the action should be regarded as arising under the Constitution and laws of the United States for purposes of removal. Because preemption is central to the administration and operation of ERISA, a contrary view would frustrate the intent of Congress in enacting the preemption provision and could cause serious practical problems for plan administrators and trustees.

Section 514 of ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" within ERISA's coverage. The term "State laws" is defined to include "all . . . State action having the effect of law" and encompasses action which impacts indirectly as well as directly on the terms and conditions of employee benefit plans. A notice of levy issued by a state agency pursuant to state law which compels the trustees of an employee benefit plan to turn plan assets over to the state constitutes state action which "relate[s] to" an ERISA-regulated plan where, as in this case, it compels the trustees to act in disregard not only of anti-alienation provisions in the plan itself, but also of ERISA's statutory prohibitions regarding the use of plan assets and the obligations of plan trustees. Hence, the notice of levy is preempted by ERISA. The state action in question here does not fall within any of the statutory exceptions to ERISA's preemption requirement. Moreover, both the statutory language and the legislative history, which indicates that the scope of preemption is as sweeping as it appears to be, preclude carving out any implied exception from what is an absolute prohibition.

ARGUMENT

I. REMOVAL OF THE FRANCHISE TAX BOARD'S CIVIL ACTION TO FEDERAL DISTRICT COURT WAS PROPER UNDER 28 U.S.C. § 1441(b)

From the outset of this litigation, the only dispute between the parties has been over the interpretation of a federal statute, specifically whether § 514(a) of ERISA preempts the Tax Board's attempt to levy under state law on the trust fund of an employee benefit plan for unpaid taxes of participants in the plan. The complaint filed by the Tax Board in state court framed the issue quite forthrightly. It alleged that the trustees refused to honor the Board's notices of levy, initially because the trustees were awaiting advice from the U.S. Department of Labor's Administrator of Pension and Welfare Benefit Programs as to whether they could do so consistent with ERISA, and subsequently because they had received the Administrator's opinion that they could not do so.[7] The Board even attached to its complaint the Administrator's opinion letter. Accordingly, as the Board stated in the Second Cause of Action of its complaint in which it sought declaratory judgment:

> There was at the time of the levies alleged above and continues to be an actual controversy between the parties concerning their respective legal rights and duties. The Board contends that defendants are obligated and required by law to pay over to the Board all amounts held in the Construction Laborers Vacation Trust for Southern California in favor of the Board's delinquent taxpayers. On the other hand, defendants contend that Section 514 of ERISA preempts state law and that the trustees lack the power to honor the levies made upon them by the State of California.
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> . . . Accordingly, a declaration by this court of the parties' respective rights is required to fully and finally resolve this controversy.

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[7] Appellees' Motion of 11/18/82, Appendix A.

Section 1441(b) of title 28, U.S.C., provides that "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties." It is well settled, as the statutory language indicates, that, except for special situations not pertinent here, the general removal provision, § 1441, is keyed to original jurisdiction. 1A *Moore's Federal Practice*, ¶ 0.157[5], p. 100 (2d ed. 1982). The relevant jurisdictional statute here is 28 U.S.C. § 1331, which provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

Although the courts have endeavored to set forth a workable standard by which these jurisdictional statutes can be applied, success in this regard has proven elusive. As one commentator put it:

> The most difficult single problem in determining whether federal question jurisdiction exists is deciding when the relation of federal law to a case is such that the action may be said to be one "arising under" that law. [Footnotes omitted].
>
> There is no single rationalizing principle that will explain all of the decisions on this point. [Footnotes omitted].
>
> [C. Wright, A. Miller & E. Cooper. 13 *Federal Practice And Procedure*, cumm. supp. § 3562, p. 339 (1980)]

Accord: *e.g.*, *First National Bank of Aberdeen v. Aberdeen National Bank*, 627 F.2d 843, 849 (8th Cir. 1980); *Town of Greenhorn v. Baker County, Oregon*, 596 F.2d 349, 351 (9th Cir. 1979).

To be sure, certain general principles have been formulated. This Court has said, for instance,

> . . . that, in order for a claim to arise "under the Constitution, laws, or treaties of the United States," "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First National Bank*, 299 US 109, 112, 81 L Ed 70, 57 S Ct 96 (1936). The federal questions "must be disclosed upon the face of the complaint, unaided by the answer." Moreover, "the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense." *Gully, supra*, at 113, 81 L Ed 70. *See also, Metcalf v. Watertown*, 128 US 586, 32 L Ed 543, 9 S Ct 173 (1888); *Tennessee v. Union & Planters' Bank*, 152 US 454, 38 L Ed 511, 14 S Ct 654 (1894); *Louisville & Nashville R. Co. v. Mottley*, 211 US 149, 53 L Ed 126, 29 S Ct 42 (1908); *Taylor v. Anderson*, 234 US 74, 58 L Ed 1218, 34 S Ct 724 (1914); *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 US 667, 94 L Ed 1194, 70 S Ct 876 (1950).
>
> [*Phillips Petroleum Co. v. Texaco*, 415 U.S. 125, 127-128 (1974)]

On the other hand, the Court has also recognized the need to eschew mechanical application of the foregoing principles. As Justice Cardozo stated in his oft-cited opinion for the Court in *Gully v. First National Bank*, 299 U.S. 109, 117-118 (1936):

> This Court has had occasion to point out how futile is the attempt to define a "cause of action" without reference to the context. *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 67, 68, 77 L.ed. 619, 622, 623, 53 S. Ct. 278. To define broadly and in the abstract "a case arising under the Constitution or laws of the United States" has hazards of a kindred order. What is needed is something of that common-sense accommodation of judgment to kaleidoscopic situations which characterizes the law in its treatment of problems of causation. One could carry the search for causes backward, almost without end.

> *Bird v. St. Paul F. & M. Ins. Co.*, 224 N.Y. 47, 51, 120 N.E. 86, 13 A.L.R. 875; *Leyland Shipping Co. v. Norwich Union F. Ins. Soc.* [1918] A.C. 350, 369-H.L.; *Aetna F. Ins. Co. v. Boon*, 95 U.S. 117, 130, 24 L.ed. 395, 398; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U.S. 469, 474, 24 L.ed. 256, 258. Instead, there has been a selective process which picks the substantial causes out of the web and lays the other ones aside. As in problems of causation, so here in the search for the underlying law. If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible. We shall be lost in a maze if we put that compass by.

For purposes of determining removal jurisdiction under § 1441, claims of federal preemption present a particularly nettlesome problem. At least two members of this Court had occasion only recently to note that the problem was unresolved. Thus, during this very term, Justices White and Marshall dissented from the denial of certiorari in *Kerr-McGee Chemical Corp. v. Illinois*, 51 U.S.L.W. 3417 (No. 82-386, Nov. 30, 1982), on the ground that the "issue whether, or under what circumstances, a defendant's federal preemption claim presents a federal question sufficient to support removal of a state plaintiff's complaint which on its face raises only state claims, is a substantial one going to the heart of the power of federal courts to determine claims raised in state court proceedings." As the Eighth Circuit pointed out in its *en banc* opinion in *First National Bank of Aberdeen v. Aberdeen National Bank*, *supra*, 627 F.2d at 850-851, and cases cited therein, many courts have agreed "that a defense of preemption differs from other state law defenses in that preemption completely elimi-

nates the legal foundation of plaintiff's claim, whereas other defenses merely contest the applicability of the state law to the given fact situation." Those courts are of the view that "the removal court must look beyond plaintiff's complaint in order to ascertain what law the action really arises under, and for that purpose must determine the validity of defendant's assertion of preemption." On the other hand, other courts, including the Eighth Circuit in *Aberdeen*, have insisted on strict adherence to the general rules for determining whether an action arises under federal law, and hold that an assertion of preemption is a defense to a state claim and not a ground for federal jurisdiction.

Whatever the merits of the differing approaches taken by the courts with respect to claims of preemption involving other federal statutes, claims of preemption under ERISA warrant special consideration. Such claims often typify the "kaleidoscopic situation" referred to by Justice Cardozo in *Gully, supra*, to which a "common-sense accommodation of judgment" is required. In terms of the "compass" offered by *Gully*—which distinguishes "between controversies that are basic and those that are collateral, between disputes that are necessary and those that are merely possible"—claims of preemption under ERISA tend to be both "basic" and "necessary." In the case at bar, for instance, as shown above the claim of federal preemption is the only substantive dispute in the case and thus obviously "basic" and "necessary"—so much so that the Plaintiff Tax Board set forth the preemption issue in its complaint, asked for declaratory judgment with respect thereto, and in its current brief to this Court urges the Court "to hear and decide this appeal" notwithstanding its contention that "the District Court did not have jurisdiction over this case." (Tax Board's brief, p. 16).

Moreover, the preemption provision of ERISA is an important part of the structural framework of that statute. Accordingly, not to allow removal to federal court

of "basic" and "necessary" issues of preemption arising under ERISA is inconsistent with the legislative objectives. In a very real sense, the same legislative history which is relevant to the merits of the preemption issue in this case likewise has a bearing on the jurisdictional issue. Accordingly, although we cite that legislative history in more detail at pp. 18-21, *infra*, an abbreviated reference to it here is warranted.

The enactment of ERISA marked "the emergence of a comprehensive and pervasive Federal interest" in private employee benefit programs which "require[s] . . . the displacement of State action. . ." ERISA Leg. Hist., Vol. III at 4770-4771 (Remarks of Senator Javits).[8] Senator Javits added that Congress intended "that a body of Federal substantive law will be developed by the courts to deal with issues involving rights and obligations under private welfare and pension plans." *Ibid.* It was further intended that preemption of federal law in this area should "apply in its broadest sense to all actions of State or local governments. . ." ERISA Leg. Hist., Vol. III at 4745-46 (Remarks of Senator Williams). Indeed, the "reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans" was described as "the crowning achievement" of ERISA. ERISA Leg. Hist., Vol. III at 4670-71 (Remarks of Congressman Dent). Because of the importance which Congress attached to preemption in enacting ERISA, and also because ERISA is a "comprehensive and reticulated statute" adopted by Congress after careful study,[9] it is virtually inconceivable that Congress meant that plaintiffs

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[8] Citations to "ERISA Leg. Hist." refer to the separately bound legislative history: Senate Comm. on Labor and Public Welfare, Subcomm. on Labor, 94th Cong., 2nd Sess., Legislative History of the Employee Retirement Income Security Act of 1974 (Three Volumes) (1976).

[9] *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 510 (1981); *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980).

should be entitled to have preemption questions involving ERISA § 514 litigated in state courts without giving defendants the option to remove those questions to the federal courts under 28 U.S.C. § 1441(b). Rather, the conclusion is compelling that ERISA creates specific and uniquely federal rights, and that Congress expressed a strong preference that controversies regarding those rights be adjudicated in a federal tribunal, thereby eliminating the threat of conflicting and inconsistent state and local regulation.[10]

In other situations in which it has been found that Congress "has created a broad, comprehensive scheme" covering a particular area and has thus "occupied the field to the exclusion of state law," removal jurisdiction has been sustained on the ground that the complaint, even though it may not allege a federal claim *in haec verba*, does so *de facto*. *E.g.*, *North American Phillips Corp. v. Emery Air Freight Corp.*, 579 F.2d 229, 233-234 (2nd Cir. 1978) (broad federal statutory scheme covering interstate shipment of freight). Significantly, in an area of labor law where this Court has recognized an overwhelming federal interest but not an exclusion of state law, removal has been sanctioned. Thus, in *Avco Corp. v. Aero Lodge, 735*, 390 U.S. 557 (1968), a state court action to enforce a "no strike" clause in a collective bargaining agreement was deemed to be a suit under § 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185, and, hence, removable to a federal court pursuant to 28 U.S.C. § 1441. However, in its subsequent decision in *Boys Markets v. Retail Clerks Union*, 398 U.S. 235, 243-245 (1970), the Court made clear, as it had concluded *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), "that the congressional purpose embodied in § 301(a) was to *supplement*, and not to encroach upon,

[10] *Cf.*, *Cartledge v. Miller*, 457 F. Supp. 1146, 1151-1153 (S.D.N.Y. 1978), *citing Mitchum v. Foster*, 407 U.S. 225, 237 (1972), *Marshall v. Chase Manhattan Bank N.A.*, 558 F.2d 680 (2nd Cir. 1977), and 120 Cong. Rec. 29197 (1974) (Cong. Dent).

the pre-existing jurisdiction of the state courts" over suits for violations of collective-bargaining agreements (ital. as in original). In light of *Boys Markets*, the only principled explanation for the removal jurisdiction approved in *Avco* is that any action to enforce the terms of a collective bargaining agreement, even one brought in state court alleging a claim under state law, is so likely to implicate in some way questions of federal labor law and the national labor policy that "removal is but one aspect of the primacy of the federal judiciary in deciding" those questions. (390 U.S. at 560, footnote omitted).

So with respect to ERISA, in which Congress has created a broad, comprehensive scheme in which preemption of state action plays a significant role, we submit that in order to preserve the primacy of the federal judiciary in deciding questions of federal law in a statutory area where there is an overwhelming federal interest, removal should be allowed when preemption questions are raised.

Finally, there are compelling practical considerations, which the facts of this case well illustrate, for permitting removal where "basic" and "necessary" preemption questions involving ERISA are raised. The trustees in this case were confronted with an advisory opinion from the Department of Labor, one of the federal agencies which is responsible for ensuring compliance with ERISA and issuing regulations and interpretations thereunder, that the state's attempt to levy on the trust was preempted by federal law. Moreover, the opinion reminded the trustees of the risks they ran as fiduciaries should they choose nonetheless to comply with the Tax Board's levy notices. In particular, the opinion pointed out that ERISA § 403(c)(1), 29 U.S.C. 1103(c)(1), requires that "the assets of a plan . . . shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable

expenses of administering the plan." The opinion also cited ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), which requires a fiduciary to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . in accordance with the documents and instruments governing the plan. . ." With regard to the latter, the opinion quoted the trust instrument which mandated that "the money in each vacation account be received by the employee entitled thereto personally" and prohibited any "encumbrance or charge by any employee or other persons" on funds in participants' vacation accounts.

It is well settled that plan fiduciaries under ERISA who breach any of the responsibilities, obligations, or duties imposed upon them by that statute are personally liable for the losses such breach may cause. Indeed, ERISA § 409(a), 29 U.S.C. § 1109(a), so provides.

If the trustees in this case were precluded from removing the Board's action to federal district court and the state court then decided the preemption issue in favor of the Board, could the trustees rely on the state court's determination? Would they have a greater duty to appeal such an adverse determination even to the point of seeking certiorari from this Court than if the matter had been decided by a federal court? If the trustees paid over funds in participants' accounts pursuant to the state court's determination and the participants then sued the trustees for breach of their fiduciary duty under § 502 of ERISA in federal district court, would the court relieve the trustees of personal liability even if it differed with the state court's conclusion on the preemption issue? In short, can the trustees—faced with conflicting advice from the Department of Labor and at risk as fiduciaries under ERISA—be confident of immunity if they comply with a state court ruling? And if they do not comply, do they face penalties from the state court for such noncompliance?

Surely to force upon plan trustees and administrators this "damned if you do, damned if you don't" approach does not further the policies of ERISA. *See N.L.R.B. v. Dorn's Transportation Company*, 405 F.2d 706, 715 (2nd Cir. 1968). Rather, the better policy choice is to avoid these difficulties by allowing removal of actions brought in state court so that issues of overriding federal concern—the scope of ERISA's preemption provision—can be resolved in federal court.[11]

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[11] In *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 326-328 (2nd Cir. 1982), the plaintiff brought an action in federal district court seeking a declaratory judgment that a Connecticut statute requiring employers to provide health and life insurance in certain circumstances was preempted by ERISA. The defendant argued that the district court was without jurisdiction to hear the case because neither ERISA itself nor the Declaratory Judgment Act, 28 U.S.C. § 2201, provided the necessary jurisdictional basis. The plaintiff countered that, "even in a case where the preemptive federal law provides it with no right to relief, the doctrine of preemption nevertheless provides 'arising under' jurisdiction" pursuant to 28 U.S.C. § 1331. Both the district court and the court of appeals agreed with the plaintiff. The court of appeals concluded, *inter alia*, that "a cause of action invokes federal jurisdiction . . . where it presents a claim requiring construction of the Act [ERISA]" and that "a declaratory plaintiff can come into federal court asserting that preemption affords it insulation from a state-based claim." 690 F.2d at 328. The court also pointed out that "pragmatic considerations make it eminently logical and sensible that the forum for such a dispute be the federal district court."

Aside from the fact that in *Stone & Webster* it was the plaintiff which brought the action in federal court seeking to sustain a claim of preemption whereas in the instant case it is the plaintiff which brought an action in state court seeking to avoid a claim of preemption, the jurisdictional issues in the two cases are quite parallel. For essentially the same reasons as advanced by the court of appeals in that case, it is as logical and sensible in the instant case as it was in *Stone & Webster* for the forum for resolving the dispute over ERISA preemption to be the federal district court. We suggest that precluding federal court determination of "basic" and "necessary" ERISA preemption questions merely because the action was brought initially in state court would serve no useful purpose but rather would encourage an unseemly "race to the courthouse."

II. THE COURT OF APPEALS WAS CORRECT IN CONCLUDING THAT ERISA § 514(a) PREEMPTS CALIFORNIA'S STATUTORY AUTHORIZATION FOR THE FRANCHISE TAX BOARD TO LEVY AGAINST A VACATION TRUST TO SATISFY A BENEFICIARY'S DELINQUENT TAXES

ERISA § 514(a) provides quite simply and directly that the provisions of Title I and IV of ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . ." which is covered by ERISA, as that coverage is set forth in § 4 of Title I. The words "any and all" mean exactly what they say: every state statute that fits the description of "relating to" an employee benefit plan is preempted. *National Carriers' Conference Committee v. Heffernan*, 454 F. Supp. 914, 915 (D. Conn. 1978). Moreover, Congress took care to make certain that the term "State laws" would be all-encompassing. In § 514(c)(1), it defined that term to include "all laws, decisions, rules, regulations or other State action having the effect of law, of any State." And in § 514(c)(2), Congress was equally careful to specify that "'State' includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title."

There are certain limited categories of state laws that Congress excepted from the "any and all" preemption requirement of § 514(a). Thus, § 514(b)(4) preserves "any generally applicable criminal law of a State." And § 514(b)(2)(A) provides that "nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." However, lest the latter provide an unintended loophole for state regulatory authority, Congress added § 514(b)(2)(B) forbidding states from deeming ERISA-covered plans and trusts to be insurance companies, banks, trust companies, or investment companies.

It is well settled that where, as here, "Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980). That intent, however, is not to be found in the legislative history of ERISA. Instead, that legislative history persuasively—indeed, unqualifiedly—shows that Congress knew exactly what it wanted to accomplish in § 514 and used unmistakably plain statutory language to achieve that objective.

Thus, the versions of ERISA which initially passed the House and Senate contained preemption provisions which were considerably more limited than the current § 514(a). The House bill provided that "part I of this subtitle shall supersede any and all laws of the States and of political subdivisions thereof insofar as they may now or hereafter relate to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any employee benefit plan to which part I applies." ERISA Leg. Hist., Vol. III at 3897, 4057-4058. The Senate bill provided that "the provisions of this Act or the Welfare and Pension Plans Disclosure Act shall supersede any and all laws of the States . . . insofar as they may now or hereafter relate to the subject matters regulated by this Act or the Welfare and Pension Plans Disclosure Act. . ." ERISA Leg. Hist., Vol. III at 3598, 3820. It is evident that the approach to preemption taken in these earlier versions of ERISA is quite different from the approach taken by the House and Senate Conference Committee, which rejected both the House and Senate bills and agreed on a substitute that was ultimately enacted into law. ERISA Leg. Hist., Vol. III at 4518. Whereas the earlier versions limited preemption to specific enumerated areas or "to the subject matters" regulated by federal law, the substitute preempted all state laws "as they may now or hereafter relate to any employee benefit plan" subject to certain enumerated excep-

tions. In short, "Congress made a clear-cut decision not to identify various subjects on which state laws were to be preempted, but instead sought to avoid constant litigation over the scope of preemption by preempting, with certain exceptions, 'all' state laws insofar as they 'relate' to plans covered by ERISA." *Pervel Industries, Inc. v. Connecticut Commission on Human Rights*, 468 F. Supp. 490, 492 (D. Conn. 1978), *aff'd*, 603 F.2d 214 (2nd Cir. 1979), *cert. denied*, 444 U.S. 1031.

That this shift in approach adopted by the Conference Committee was indeed a clear-cut and well thought-out decision is seen from the explicit statements made by three members of Congress who were most intimately involved in the drafting and passage of ERISA. As Senator Jacob Javits, the ranking minority member of the Senate Committee on Labor and Public Welfare, explained (ERISA Leg. Hist., Vol. III at 4770-4771):

> Both House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill.
>
> Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.
>
> Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs. . . .
>
> . . . It is also intended that a body of Federal substantive law will be developed by the courts to deal

with issues involving rights and obligations under private welfare and pension plans.

Significantly, Senator Javits pointed out that the conferees fully recognized "the dimensions" of the policy embodied in the new preemption provision adopted by the Conference Committee. Nevertheless, they concluded, particularly in light of a study to be conducted by a Congressional Joint Pension Task Force, that "[i]f it is determined that the preemption policy devised has the effect of precluding essential legislation at either the State or Federal level, appropriate modifications can be made." ERISA Leg. Hist., Vol. III at 4771.[19]

The remarks of Senator Harrison Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare, were along the same lines as those of Senator Javits. In introducing the Conference Report on ERISA, Senator Williams "stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans." ERISA Leg. Hist., Vol. III at 4745-46. Senator Williams emphasized that the "principle" embodied in the preemption provision of the substitute bill "is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof. . ." *Ibid.*

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[19] The mechanism for continued Congressional oversight of the preemption provision, as well as other ERISA provisions, was actually written into the bill itself. Thus, ERISA § 3021 provides for the establishment of a Joint Pension Task Force, whose duties were to be carried out by the staffs of the Congressional committees having jurisdiction over pension and welfare benefits legislation. ERISA § 3022(a)(4) specifies that one of the duties of the Joint Pension Task Force is to "make a full study and review of . . . the effects and desirability of the Federal preemption of State and local law with respect to matters relating to pension and similar plans."

Likewise, on the floor of the House of Representatives Congressman John Dent, Chairman of the Subcommittee on Labor of the House Education and Labor Committee, heralded the Conference Committee version of the preemption clause as a major accomplishment (ERISA Leg. Hist., Vol. III at 4670-71):

> Finally I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation . . .
>
> The conferees, with the narrow exceptions specifically enumerated, applied this principle in its broadest sense to foreclose any non-Federal regulation of employee benefit plans. Thus, the provisions of Section 514 would reach any rule, regulation, practice or decision of any State, subdivision thereof or any agency or instrumentality thereof . . . which would affect any employee benefit plan as described in section 4(a) and not exempt under section 4(b).

The formal Joint Explanatory Statement of the Conference Committee was more succinct, but nonetheless echoed the theme that "the provisions of Title I are to supersede all State laws that relate to any employee benefit plan that is established by an employer engaged in or affecting interstate commerce or by an employee organization that represents employees engaged in or affecting interstate commerce." ERISA Leg. Hist., Vol. III at 4650. The Joint Explanatory Statement also noted that the substitute bill "provides that the congressional Pension Task Force is to study this provision and report back to the labor committees of the Congress on the results of its study." *Ibid.*

Although § 514(a) preempts state laws which "relate to" employee benefit plans, there is no precise statutory

definition of that term. However, as shown *supra*, p. 17, § 514(c)(2) defines a "State" to include any instrumentality or agency thereof "which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans. . . ." And ERISA § 514(c)(1) defines "State law" to include "all laws, decisions, rules, regulations or other State action having the effect of law. . . ." Given this all encompassing language and in light of the legislative history cited above, the inference is compelling that Congress intended the phrase "relate to" to be interpreted in an equally broad, rather than a constricted, manner. *Bucyrus-Erie Co. v. Dept. of Industry, Labor and Human Relations of the State of Wisconsin*, 599 F.2d 205, 208-210 (1979), *cert. denied*, 444 U.S. 1031 (1980).

In light of the foregoing, it is plain that the notices of levy issued in the instant case pursuant to state statutes constitute "state action" which "relate[s] to" an ERISA-regulated employee benefit plan within the meaning of ERISA § 514. Nor is the relationship remote or peripheral. For we have here a state agency compelling the plan trustees to turn plan assets held in trust over to the state in violation of provisions in the plan document which require that the monies in each individual's vacation account be paid to that individual personally and which prohibit any alienation, encumbrance or charge against those funds. Simply put, the state in this case is seeking to compel the trustees to disregard their obligations under ERISA § 404(a)(1)(D) to discharge their duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV [of ERISA]." The trustees might also be violating other requirements of ERISA §§ 403 and 404 in that, by honoring the notices of levy in contravention of the terms of the plan itself, the trustees would not be administering the plan "solely in the interest of the participants and beneficiaries" and would, in fact, be diverting plan assets for purposes other than "the

exclusive purposes of providing benefits to participants in the plan and defraying reasonable expenses of administering the plan."

To be sure, the California statutes pursuant to which the notices of levy in this case were issued were probably not enacted for the purpose of regulating employee benefit plans. But, as this Court made clear in *Alessi v. Raybestos-Manhattan, Inc.*, *supra*, 451 U.S. at 524-525, that is beside the point:

> It is of no moment that New Jersey intrudes indirectly, through a workers' compensation law rather than directly, through a statute called "pension regulation." ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern.

In *Alessi*, the state action found to encroach on an area of exclusive federal concern was a New Jersey statute which prohibited integration of workers' compensation and pension benefits even though such integration was permitted but not required by ERISA. So here we have state action which attempts to nullify a plan provision—in this case a bar against alienation or encumbrance of benefits—which is permitted but not required by ERISA. Although the plan provisions in the two cases are obviously different, we submit that the state action in the case at bar is analytically no different in "relat[ing] to" an employee benefit plan, and thus encroaching on an area of exclusive federal concern, than the state action found preempted in *Alessi*.

Once it is determined, as we urge it must be here, that a state is seeking to take action which directly or indirectly "relate[s] to" an employee benefit plan, that should normally end the matter: § 514(a) of ERISA mandates federal preemption unless the state action fits within the narrow statutory exceptions (none of which are relevant in the instant case). There is no room in the statutory language or legislative history for judicial balancing of

competing state and federal interests. Congress foreclosed that option in deciding that the preemption provision "is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof." (*Supra*, p. 20). In extending federal preemption to its outer limits, Congress had perfectly rational and legitimate objectives: to eliminate the threat of conflicting and inconsistent state and local regulation, and, as important, to avoid the potential for "endless litigation" over the scope of federal preemption. As did this Court in *Alessi*, the decisions of the lower federal courts have delineated and sought to give full effect to the Congressional purpose in enacting § 514. *E.g., Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 328-330 (2nd Cir. 1982); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1214-1216 (8th Cir. 1981); *Std. Oil Co. of Cal. v. Agsalud*, 633 F.2d 760 (9th Cir. 1980); *Pervel Industries v. Conn. Comm'n on Human Rights, supra*; *National Carriers Conference Committee v. Heffernan, supra.*

The Franchise Tax Board argues (Brief, pp. 26-29), however, that the case at bar is analogous to those cases in which the courts have allowed pension plan benefits to be subject to the payment of alimony and family support. *E.g., Operating Engineers Pension Trust Fund v. Zamborsky*, 650 F.2d 196 (9th Cir. 1981); *American Tel. & Tel. v. Merry*, 592 F.2d 118 (2nd Cir. 1980); *Cartledge v. Miller, supra.* Assuming without conceding that those cases are correct, they have been regarded as *sui generis*—a "judicial exception . . . carved out of . . . [a] seemingly absolute prohibition" and "premised upon the statute's broad purpose to provide protection for employees and their families . . ."—the rationale for which cannot serve as valid precedent in other ERISA preemption cases. *Tenneco Inc. v. First Virginia Bank of Tidewater*, 4th Cir., No. 82-1158, January 27, 1983, slip opinion pp. 5-6. Accord: *Stone & Webster Engineering Corp.*

v. Ilsley, supra, 690 F.2d at 329; *General Motors Corp. v. Buha*, 623 F.2d 455, 460-461 (6th Cir. 1980).[13]

The Franchise Tax Board further argues (Brief, pp. 32-33) for the creation of an implied exception to ERISA's broad preemption provision to cover its claim in this case based on "the different status of pension and welfare plans." The Board emphasizes that § 206(d) of ERISA requires only pension plans but not welfare plans to contain a provision that benefits provided under the plan may not be assigned or alienated. However, it does not follow, as the Board would have it, that therefore Congress did not intend ERISA's preemption provision to cover state action to levy on welfare plan assets. The Board cites nothing in the legislative history of ERISA, and we are not aware of anything, that would support the conclusion that § 206(d) by negative implication was intended to permit a state or any other creditor to levy on the assets of a welfare plan notwithstanding prohibitions against alienation contained in the plan document.

On the contrary, it is readily apparent that the same concerns which caused Congress to require an anti-alienation provision to protect pension benefits are present with respect to welfare benefits. For example, it would be incongruous to bar garnishment of pension benefits by creditors, either private or state and local

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[13] Significantly, the Department of Labor, which is charged with enforcement and interpretation of ERISA, likewise regards state action to enforce family support obligations as presenting a unique situation for purposes of ERISA preemption. Thus, in *Cartledge v. Miller, supra*, the Department took the position in an *amicus* brief that a state court support decree was not preempted. In the quite different circumstances presented by the instant case, the Department concluded in an advisory opinion that the state's attempt to levy on the assets of the vacation trust is preempted. (*Supra*, p. 2). As the court in *Cartledge* observed, the Labor Department's "interpretation of the Act, though not controlling, is entitled to great weight." 457 F. Supp. at 1156, citing, *inter alia, United States v. Penn. Chem. Corp.*, 411 U.S. 655, 674 (1973).

government, but yet permit such garnishment of disability benefits paid by a welfare plan which by its terms prohibits alienation or encumbrance of benefits. Surely, disability benefits must be deemed as important to plan participants as pension benefits, if not more so, and at least as deserving of ERISA's protection. Of course, if the Franchise Tax Board's effort to levy against a vacation trust which contains an anti-alienation provision is not preempted by ERISA, consistency would mandate that a similar attempt to levy against a trust paying disability benefits would also not be preempted by ERISA—a result not likely intended by Congress.

However, there was good reason for Congress not to require all welfare plans to have an anti-alienation provision, as ERISA § 206(d) requires of pension plans, but rather to leave the inclusion of such a provision as a matter to be determined by the plan draftsmen in light of the purposes of the plan. For instance, it is common for participants in health insurance plans to assign the benefits they are entitled to thereunder to hospitals and doctors so that these providers of medical care can receive payment directly from the plan for services rendered. A statutory anti-alienation provision applicable to all welfare plans might well preclude such widely utilized arrangements.

In short, just because Congress made anti-alienation provisions permissive rather than mandatory with respect to welfare plans does not mean that they can be overridden by state action any more than the permissive integration provisions which were the subject of the *Alessi* decision can be so overridden. Accordingly, where, as here, a welfare plan does incorporate an anti-alienation provision which is permissible under ERISA and which surely serves legitimate ends from the standpoint of plan participants, ERISA's preemption clause requires that the anti-alienation provision be given full effect as against state action seeking to undermine it.

CONCLUSION

For all of the foregoing reasons, ERIC, as *amicus curiae*, urges that the judgment of the Court of Appeals be affirmed.

Respectfully submitted,

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No. 82-695
IN THE

Supreme Court of the United States

October Term, 1982

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellant,

vs.

CONSTRUCTION LABORERS VACATION TRUST FOR SOUTHERN CALIFORNIA, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Brief of Amicus Curiae Multistate Tax Commission in Support of Appellant.

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Counter Statement of Questions Presented.

Does the Employment Retirement Income Security Act of 1974 (ERISA) on its face or otherwise invalidate a state statute that permits a state to collect delinquent state personal income taxes from an ERISA regulated vacation trust when ERISA permits the federal government to collect delinquent federal taxes from ERISA regulated pension funds?

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Brief of Amicus Curiae Multistate Tax Commission in Support of Appellant.

INTRODUCTORY STATEMENT.

This brief is submitted by the Multistate Tax Commission in support of the Appellant. Both parties to this proceeding have consented to the filing of this brief.[1]

STATEMENT OF INTEREST.

The Multistate Tax Commission (hereinafter referred to as the MTC) is the official administrative agency of the Multistate Tax Compact (hereinafter referred to as the Compact) currently entered into by nineteen states, including

[1] Consent letters have been filed with the Clerk of the Court.

California and the District of Columbia as full members, and by eleven states as associate members.[1]

The purposes of the Compact are to:

1. Facilitate proper determination of state and local tax liability of the multistate taxpayers, including the equitable apportionment of tax bases and the settlement of apportionment disputes.

2. Promote uniformity or compatibility in significant components of tax systems.

3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

4. Avoid duplicate taxation.[2]

In the fulfillment of these objectives the MTC is vitally concerned with the ability of the states to administer their taxes in a reasonable and even-handed manner within the framework of our federal system. The MTC believes that this objective has been frustrated by the Ninth Circuit's decision below. The circuit court construed a federal statute to prohibit states from levying upon ERISA vacation trust funds even though no federal legislation requires this result and even though the same prohibition is not imposed upon the federal government.

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[1]The current regular members are the states of Alaska, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah, Washington and West Virginia. The associate members are the states of Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Pennsylvania and Tennessee.

[2]The constitutionality of the Compact was upheld by the United States Supreme Court in *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978), *aff'g* 417 F. Supp. 795 (S.D.N.Y. 1976). The Court there noted that the Compact "symbolized the recognition that, as applied to multistate businesses, traditional state tax administration was inefficient and costly to both State and taxpayer." 434 U.S. at 456.

The MTC believes that the Ninth Circuit erred in its decision. For the reasons stated in this *amicus* brief, and for the reasons stated in California's Brief, the MTC respectfully requests that this Court take jurisdiction of this appeal to resolve the far-reaching preemption and Tenth Amendment issues involved.

ARGUMENT.

I.

The Decision of the Ninth Circuit Should Be Reversed Because the District Court Lacked Subject Matter Jurisdiction.

The MTC agrees with the Franchise Tax Board (hereinafter referred to as the FTB) that the federal district court lacked jurisdiction to decide this matter. Federal jurisdiction must be established solely by the complaint of the moving party. *Gully v. First National Bank*, 299 U.S. 109 (1936). In the case at bar, the FTB's causes of action, as filed in state court, were based solely on state law and sought recovery against only an in-state defendant. The complaint neither raised a federal question nor did diversity of citizenship exist. The only federal question posed was the trustee's defense, which does not represent a sufficient jurisdictional basis for removal to federal court.

Each state has a fundamental interest to have controversies arising under state law adjudicated in a state court. To permit otherwise not only undermines present jurisdictional standards, but also strikes at the heart of each state's judicial authority to decide matters affecting its own sovereignty.

II.

Congressional Enactment of ERISA Does Not Evidence Explicit or Implicit Intent to Preempt State Sovereignty to Tax as Traditionally Reserved to the States by the Tenth Amendment.

Assuming *arguendo* that the federal district court had jurisdiction, the Ninth Circuit Court of Appeals erroneously determined that the federal ERISA legislation preempted the power of the State of California to collect delinquent taxes from a vacation trust established under ERISA. See *Franchise Tax Board v. Construction Laborers Vacation*

Trust For Southern California, 679 F.2d 1307 (9th Cir. 1982).

In areas that are of vital concern to the states, such as revenue collection, courts have held that the "police powers of the States were not to be superceded by the Federal Act unless that was the clear and manifest purpose of Congress." *Operating Engineer's Local No. 428 v. Zamborsky*, 650 F.2d 196, 199 (9th Cir. 1981). The purpose of ERISA's preemption provisions was to eliminate the threat of conflicting or inconsistent state and local standards for, and regulation of, employee benefit plans. Under these provisions, ERISA preempted state law only if state law purported to *regulate*, directly or indirectly, *the terms and conditions* of ERISA employee benefit plans. 29 U.S.C. § 1144(c)(2).

Cal. Rev. & Tax. Code § 18817, the levying statute under present consideration, does not directly or indirectly *regulate* "the terms or conditions of employee benefit plans covered" by ERISA. 29 U.S.C. § 1144(c)(2). California law does not change the reporting and disclosure requirements, or standards of fiduciary responsibility, or any other standards that vacation trusts must meet to conform with ERISA. Section 18817 is a statute that generally applies to all delinquent state income taxpayers, thus securing for the state a lifeblood of revenue. This reasonable exercise of traditional state sovereignty should be preempted only upon a clear manifestation of Congressional intent. Congressional intent to preempt this legitimate exercise of state power is not evidenced by federal legislation governing vacation trust funds. Even Congressional intent to preempt states from collecting delinquent taxes from *pension* trust funds is also lacking. As further discussed below, ERISA permits the federal government to levy upon pension trust funds

to collect delinquent federal tax revenues. Treas. Reg. § 1.401(a)-13.

If ERISA Section 514 (29 U.S.C. § 1144) is totally pervasive, then all state laws which tangentially relate to ERISA have suffered a preemption demise. Many lower courts have determined that Congress did not intend that ERISA should preempt the rights of each state to control its vital and sovereign functions, particularly with regard to domestic relations and pension plans. See, *e.g.*, *Stone v. Stone*, 632 F.2d 740 (9th Cir. 1980); *Carpenters Pension Trust For Southern California v. Kronschnabel*, 632 F.2d 745 (9th Cir. 1980), *cert. denied*, 453 U.S. 922 (1981). The MTC believes that a state's power to tax and uniformly enforce the collection of its tax should be afforded the same judicial protection. A finding of complete preemption, not only in the area of taxation but in all areas touched by ERISA, divests each state the right to determine the application of its own laws to its own citizenry.[4]

When Congress has intended to prohibit application of state levying statutes, Congress has enacted explicit statutory language to this end. See, *e.g.*, Social Security Act (42 U.S.C. § 407); Railroad Retirement Act of 1974 (45 U.S.C. § 231M). Because ERISA fails to provide explicit preemptory language with regard to ERISA vacation trusts, no preemption intent should be manufactured by implication.

Accordingly, the MTC submits that if Congress had intended to displace every aspect of state law that is coincidentally related to the subject matter regulated by ERISA, then Congress would have enacted clear and unequivocal

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[4]Even a state law which would hold benefits under ERISA subject to state taxation at the point of distribution of the benefits to a beneficiary would have a tangential relationship to ERISA.

language. Absent explicit Congressional intent, the MTC respectfully submits that this Court should grant jurisdiction and reverse the decision of the Ninth Circuit Court of Appeals.

III.

It Is Illogical to Imply That Congress Intended That ERISA Preempts a State Statute That Permits a State to Collect Delinquent State Personal Income Taxes From an ERISA Regulated Vacation Trust Fund When ERISA Permits the Federal Government to Collect Delinquent Federal Taxes From All the Regulated Pension Funds Covered by ERISA.

Laying all technicalities aside, the MTC believes that this Court should recognize the interaction between Federal law and California law in regard to the Tenth Amendment and preemption questions at issue. ERISA § 514 (29 U.S.C. § 1144) provides, subject to exceptions not relevant here, as follows: Subsection (a) states that ERISA provisions generally "supersede any and all State laws *insofar as they may now or hereafter relate to any* employee benefit plan" (emphasis added). Subsection (d) provides generally that nothing in ERISA "shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law."

As a package, subsection (a) as construed by the Ninth Circuit, prohibits a state tax levy on a vacation trust fund and subsection (d) permits the federal government, as provided in Treas. Reg. § 1.401(a)-13,[5] to collect delinquent

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[5]This Treasury Regulation provides that any qualified plan shall not preclude either (1) "The enforcement of a Federal Tax levy made pursuant to section 6331" (providing for levy and seizure); and (2) "The collection by the United States on a judgment resulting from an unpaid tax assessment."

federal taxes by levying upon *any trust fund* established under ERISA, including the specific vacation trust funds at issue. In the MTC's judgment, if federalism and state sovereignty mean anything, this absurd result should not be tolerated by this Court under the Tenth Amendment even if this result was required by ERISA. No conceivable legitimate federal policy included in ERISA supports a result that invalidates California's power to collect delinquent taxes and at the same time permits the federal government to do so. In no event should the lower court's preemption holding be tolerated in the absence of specific unequivocal legislation by the Congress — which is clearly and admittedly absent in this case.

CONCLUSION.

State sovereignty to administer and collect taxes is an area traditionally reserved to the states under the Tenth Amendment. Absent explicit Congressional intent, ERISA should not be interpreted to preempt California's legitimate exercise of its power to collect delinquent state taxes. Because ERISA permits the federal government to collect delinquent federal taxes from ERISA regulated pension funds, ERISA should not be interpreted to preempt state governments from collecting delinquent state taxes from ERISA regulated vacation trust funds.

For these reasons, and the reasons stated in California's Brief, the MTC respectfully requests that this Court grant jurisdiction and reverse the decision of the Ninth Circuit.

Respectfully submitted,

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No. 82-695

In the Supreme Court of the United States

OCTOBER TERM, 1982

FRANCHISE TAX BOARD OF THE
STATE OF CALIFORNIA, APPELLANT

v.

CONSTRUCTION LABORERS VACATION TRUST
FOR SOUTHERN CALIFORNIA, ET AL.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether Section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1144(a), preempts the California Revenue and Taxation Code, insofar as it permits state authorities to levy upon an ERISA-covered employee welfare benefit plan to satisfy the state income tax liabilities of some of the plan's participants.

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INTEREST OF THE UNITED STATES

This case involves the application of the preemption provision of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. (& Supp. V) 1001 *et seq.* Section 514(a) of ERISA, 29 U.S.C. 1144 (a), provides that the federal statute "supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. The Secretary of Labor is charged with the responsibility of enforcing the reporting and disclosure and the fiduciary obligations that ERISA imposes on private employee benefit plans. He therefore has a substantial interest in the proper interpretation of ERISA's broad preemption provision, which Congress enacted to promote the development of private pension and welfare plans and

to assure uniform regulation of such plans. Our participation in this case is consistent with our previous amicus filings in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), and *Kramarsky* v. *Delta Airlines, Inc.*, appeal pending, No. 81-1578 (argued Jan. 10, 1983). Moreover, in this case, appellant's position is directly contrary to an opinion letter issued by the United States Department of Labor concluding, as did the court below, that ERISA's preemption provision bars state tax levies on the assets of covered employee benefit plans.

STATEMENT

A. Statutory Background

1. Congress enacted ERISA in 1974 to promote the well-being and security of employees and their dependents by protecting their interests in employee benefit plans. 29 U.S.C. 1001(a). In addition to pension plans, the statute covers a wide range of "welfare" plans offering medical, disability, unemployment, training, vacation, and other benefits. 29 U.S.C. 1002(1). The statute broadly defines a covered "welfare plan" as "any plan, fund, or program * * * established or maintained by an employer or by an employee organization, or by both * * * for the purpose of providing [such benefits] for its participants or their beneficiaries, through the purchase of insurance or otherwise * * *" (*ibid.*).

ERISA imposes certain uniform standards on the design, administration, and operation of all employee benefit plans. Every plan, for example, must be established pursuant to a written instrument, must identify the fiduciaries responsible for the plan's management, must specify the basis for payments made to and from the plan, and must have specified procedures for amending the plan and establishing a funding policy. 29 U.S.C. 1102(a) and (b). All assets of the plan, except for insurance contracts and policies, must be held in trust "for the exclusive purposes of providing benefits to partici-

pants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan." 29 U.S.C. (& Supp. V) 1103(a)(b) and (c). The statute requires the administrator of each plan to report and disclose certain information to the Secretary of Labor and the participants in the plan. 29 U.S.C. (& Supp. V) 1021-1031.

In addition, both welfare and pension plans are subject to federal standards for fiduciary conduct in the management of the plan and its assets. 29 U.S.C. (& Supp. V) 1104-1113. Specifically, every plan fiduciary "shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan; * * * (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter." 29 U.S.C. (& Supp. V) 1104(a)(1)(A) and (D).

Welfare plans are not subject to the participation, vesting, and funding provisions applicable to pension plans, 29 U.S.C. (& Supp. V) 1051-1086, including the provision that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. 1056(d)(1). The ERISA preemption provision, however, does apply to welfare as well as pension plans. Section 514(a) of ERISA declares that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. 1144(a). The term "State" is defined to include "a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter." 29 U.S.C. 1144(c)(2). On January 14, 1983, Section 514 was amended to exempt from preemption Hawaii's mandatory health benefit stat-

ute, but to retain preemption of "any State *tax* law relating to employee benefit plans" (emphasis added). 29 U.S.C. 1144(b)(5), added by Pub. L. No. 97-473, Section 301 (96 Stat. 2611).

2. California Revenue & Taxation Code provides:

> The Franchise Tax Board may by notice, served personally or by first class mail, require any employer, person, officer or department of the state, political subdivision or agency of the state * * * having in their possession, or under their control, any credits or other personal property or other things of value belonging to a taxpayer * * * to withhold, from such credits or other personal property or other things of value, the amount of any tax, interest or penalties due from the taxpayer * * * and to transmit the amount withheld to the Franchise Tax Board at such times as it may designate.

Cal. Rev. & Tax. Code § 18817 (West Supp. 1982). Any person receiving such a notice must transmit the requested amount or become personally liable. *Id.* § 18818. Moreover, the person must comply with the request "without resort to any legal or equitable action in a court of law or equity." *Id.* § 18819. The state statute provides a refund procedure for taxpayers whose taxes are collected in this manner (*id.* § 18820), but specifies no remedy for affected third parties. The third party paying the requested amount is not liable under state law to the person whose funds are transmitted to the Franchise Tax Board (*id.* § 18819).

B. Proceedings Below

Appellee Construction Laborers Vacation Trust for Southern California is a collectively-bargained employee welfare benefit plan as defined in ERISA Section 3(1), 29 U.S.C. 1002(1), established under Section 302(c) of the Labor Management Relations Act of 1947, 29 U.S.C. (Supp. V) 186(c). Employers pay a fixed sum to the

Trust for each hour worked by each employee covered by the collective bargaining agreement. The Trust holds these contributions for annual or semi-annual distribution from the vacation account established for each covered employee, under the terms of the Trust Agreement (J.A. 45). In effect, the Trust is a type of forced savings plan, or spendthrift trust, designed to insure that the participants (individual laborers) do not dissipate the vacation benefits they are eligible to receive through the Trust until they actually receive each year's lump sum payment. To this end, the Trust Agreement contains a number of provisions prohibiting alienation or garnishment of benefits, either voluntarily or by operation of law, and expressly provides that the Fund shall not be liable for the debts or liabilities of any participant or beneficiary.[1]

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[1] The anti-alienation provisions are as follows:

4.05 Neither the Associations, any individual employer, the Union, any Local Union, an employee, nor beneficiary under the Plan nor any other person shall have any right, title or interest in or to the Fund other than as specifically provided in this Trust Agreement. Neither the Fund nor any contributions to the Fund shall be in any manner liable for or subject to the debts, contracts or liabilities of any of the Associations, any individual employer, the Union, any Local Union, or any employee or beneficiary.

4.06 Each employee or beneficiary under the Plan is hereby restrained from selling, transferring, anticipating, assigning, hypothecating or otherwise disposing of his benefits hereunder or any other right or interest under the Plan, and the Board of Trustees shall not recognize, or be required to recognize, any such sale, transfer, anticipation, assignment, hypothecation or other disposition. Any such benefit, right or interest shall not be subject in any manner to voluntary transfer or transfer by operation of law or otherwise, and shall be exempt from the claims of creditors or other claimants and from all orders, decrees, garnishments, executions or other legal or equitable process or proceedings to the fullest extent permissible by law.

9.08 It is the intent and purpose of the Plan, and of this Agreement, and a material part of the consideration for the

In 1978, appellant Franchise Tax Board of California issued notices to withhold and sought to levy upon appellee to collect delinquent California income taxes, interest and penalties owed by three Trust participants (J.S. App. 19). After requesting and receiving an advisory opinion of the United States Department of Labor concluding that the California statute authorizing such tax levies was preempted by Section 514(a) of ERISA, appellee refused to honor the tax levies (J.S. App. 20; Mot. to Dis. App. A23-27). Appellant thereupon brought a "Complaint for Failure to Honor Garnishment and for Declaratory Relief" in the Superior Court of the State of California for the County of Los Angeles. The Complaint incorporated a copy of the U.S. Department of Labor's advisory opinion and sought a declaratory judgment regarding the effect of the ERISA preemption provision on enforcement of all present and future state tax levies against the Trust (Mot. to Dis. App. A1, 6-8). Appellee removed the suit to the United States District Court for the Central District of California, which denied appellant's motion to remand (J.S. App. 17).

The district court granted the appellant's motion for summary judgment, holding that the state tax levy is not preempted by ERISA. It characterized the Department of Labor's advisory opinion to the contrary as "clearly erroneous, unreasonable, arbitrary and capricious" (J.S. App. 22). The court awarded judgment in

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making of contributions to the Fund by individual employers, that the money in each vacation account shall be received by the employee entitled thereto personally. Accordingly, no payments due the Fund and no monies in the vacation accounts established pursuant to the Plan shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge by any employee or any other persons and any such anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge shall be void and ineffective. The money credited to a vacation account shall be subject to withdrawal and distribution only at the times, in the manner and for the purposes specified in this Agreement.

See Mot. to Dis. App. A12-13, 17-18.

favor of appellant in the amount of $395.49 plus interest, and appellee was declared "legally obligated to honor all future levies by the Franchise Tax Board upon defendant Trust Fund in collection of tax delinquencies of the beneficiaries of defendant Trust Fund" (J.S. App. 16).

The court of appeals reversed, with one judge dissenting (J.S. App. 1-14). In holding that the state tax levy was preempted by Section 514 of ERISA, the court placed principal reliance on this Court's decision in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). The court concluded that according such protection to welfare benefit plans is consistent with the statute and the goal of such plans to accumulate funds for the future benefit of a worker. In the court's view, "the worker's money deserves trust protection from dissipation regardless of the purpose for which the money has been set aside under ERISA" (J.S. App. 4).

SUMMARY OF ARGUMENT

1. Section 514(a) of ERISA preempts "any and all State laws [which] relate to any employee benefit plan" covered by ERISA. Here, the court below correctly held that this provision preempts the California state tax law, insofar as it authorizes a levy upon an ERISA-covered employee welfare benefit plan to collect unpaid taxes owed by plan participants.

Appellee Trust was established as a spendthrift trust for the accumulation and periodic payment of vacation benefits. It contains several provisions barring alienation or garnishment of benefits, either voluntarily or by operation of law. These anti-alienation provisions, negotiated by the parties to the trust agreement and permitted under ERISA, cannot accomplish their purpose if the state is allowed to levy upon plan assets to satisfy the tax liabilities of participants. The decision below does not defeat the ability of the state to collect the taxes owed by the plan participants. Rather, all it means is that the state cannot levy upon the assets of an ERISA-covered

plan. Hence, absent other assets of the taxpayers upon which the state can levy, it must await the periodic distribution by the plan of monies to the participants.

California's tax levy statute, as applied to appellee employee benefit plan, is analogous to the state laws preempted in *Alessi* v. *Raybestos-Manhattan, Inc.*, *supra*, and in *Kramarsky* v. *Delta Airlines, Inc.*, 666 F.2d 21 (2d Cir. 1981), appeal pending, No. 81-1578 (argued Jan. 10, 1983). None of the three state laws at issue in *Alessi*, *Kramarsky*, and the instant case, was enacted solely to regulate employee benefit plans; instead, each purported to govern other subjects, *i.e.*, workers' compensation (*Alessi*), employment discrimination (*Kramarsky*), and tax collection (in the instant case). The courts held that this indirect application was immaterial; the state laws were preempted insofar as they related to employee benefit plans. In addition, each state law had the effect of eliminating from plans certain features permitted under federal law. In *Alessi*, the feature was integration provisions with workers' compensation. In *Kramarsky*, it was treatment of pregnancy differently from other disabilities. Here, it is the anti-alienation provisions which insure that Trust monies will be expended only for the purposes established by the Trust Agreement.

The only previously reported case addressing ERISA preemption of state tax laws supports our submission here. In *National Carriers' Conference Committee* v. *Heffernan*, 454 F. Supp. 914 (D. Conn. 1978), the court held that Section 514(a) of ERISA preempted a Connecticut tax on distributions from employee welfare benefit plans. Just as a state cannot deplete the assets of an ERISA-covered employee benefit plan by directly taxing them, neither can it accomplish the same goal by levying upon the assets of such a plan to satisfy a participant's tax liability. In both instances, the state tax laws sought to be enforced "relate to" plans within the meaning of Section 514 of ERISA.

2. The legislative history of ERISA confirms Congress' intent to preempt state tax laws. Originally, the preemp-

tion provision passed by the House and Senate was narrowly cast to reach only state laws relating to subjects covered by ERISA. But the conference committee rejected this approach in favor of a broader provision preempting state laws relating to plans covered by the Act. Moreover, the conference committee specifically declined to adopt a savings provision for state tax laws even after such a provision was proposed by the Secretaries of Labor and the Treasury. Finally, in amending the preemption provision in 1983 to exempt Hawaii's mandatory health benefit statute, Congress reaffirmed that "any State tax law relating to employee benefit plans" was preempted by ERISA. Given the statutory language and the legislative history, there is no basis for an implied exception for state tax laws authorizing involuntary collection.

3. The federal preemption of state tax levies upon the assets of ERISA-covered welfare benefit plans does not violate the Tenth Amendment. As the Court recently reaffirmed in *EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. 9, for such a claim to succeed the federal statute must regulate the states as states, it must address matters that are indisputably attributes of state sovereignty, and the states' compliance with the federal law must directly impair their ability to conduct traditional governmental operations.

Here, it is doubtful that appellant can satisfy any of the requirements. First, the preemption of state laws does not regulate the states as states, but simply manifests Congress' intention to bar all garnishment by creditors, both public and private, of ERISA-covered employee pension and welfare benefit plans. For the same reason, the preemption provision does not address matters that are indisputably an attribute of state sovereignty. Rather, it addresses the state in its capacity of creditor. Finally, the preemption does not impair the ability of the state to perform traditional governmental functions. Indeed, all the decision below holds is that the state cannot levy upon the assets of an employee welfare benefit plan.

There is nothing to prevent the state from exercising its levy power against the other assets of plan participants, including their annual or semi-annual receipts from the plan—once they are distributed to the participants upon dates which are readily ascertainable (see J.A. 45). In these circumstances, the enforcement of the state's tax laws will not be impaired.

ARGUMENT

SECTION 514(a) OF ERISA PREEMPTS THE CALIFORNIA STATE TAX LAW, INSOFAR AS IT AUTHORIZES A LEVY UPON AN ERISA-COVERED EMPLOYEE WELFARE BENEFIT PLAN TO COLLECT UNPAID TAXES OWED BY PLAN PARTICIPANTS

As this Court recognized in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981), ERISA rests upon an expansive principle of federal preemption of state law. In broad language, Section 514(a) of ERISA preempts "any and all State laws" which "relate to any employee benefit plan" covered by ERISA. The court below correctly held that the preemption provision bars California from levying upon an ERISA-covered employee welfare benefit plan to collect unpaid state income taxes owed by plan participants.[2] The decision below

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[2] In noting probable jurisdiction, the Court postponed consideration of jurisdiction until hearing of the case on the merits (J.A. 106).

Appellant argues (Br. 17-19) that the case was improperly removed to the district court because that court lacked jurisdiction over this suit. In appellant's view, this proceeding was commenced as an action to collect state taxes due and owing, and the provisions of ERISA were raised by appellees as a defense to the action. Appellant contends that, in these circumstances, federal jurisdiction was not established solely by the complaint and therefore the case did not "arise[] under the Constitution, laws, or treaties of the United States" (28 U.S.C. (Supp. V) 1331(a)). See also *Gully* v. *First National Bank*, 299 U.S. 109, 117 (1936) (nondeclaratory action by state tax collector does not provide federal jurisdiction where "a question of federal law is lurking in the back-

does not defeat the ability of the state to collect the taxes owed by the particular plan participants. Rather, all it means is that the state cannot levy upon the assets of an

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ground" at best); *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667 (1950) (Declaratory Judgment Act alone does not provide federal jurisdiction where plaintiff sues on a contract and neither party has separate federal cause of action).

But appellant's complaint was not grounded solely upon state law. In broadly framing its complaint for declaratory relief, appellant expressly incorporated the United States Department of Labor's advisory opinion that the levies were barred by ERISA (J.A. 7, 68-72) and urged that "a declaration by this court of the parties' respective rights is required to fully and finally resolve this controversy," with regard to all present and future tax levies (J.A. 9). Hence, the complaint discloses that this lawsuit focuses upon an issue of federal law, viz., whether Section 514 of ERISA preempts the California tax law, insofar as it authorizes a levy upon the assets of an ERISA-covered plan.

Moreover, California law does not permit the relief that is available in a federal district court, which would prevent collection of state income tax. Cal. Rev. & Tax. Code § 19081 (West 1970 & Supp. 1982). It appears well settled that a party lacking its own separate cause of action under the federal statute at issue may nonetheless bring a declaratory judgment action to clarify its status under that statute. See, *e.g.*, *Jewell Ridge Coal Corp.* v. *United Mine Workers*, 325 U.S. 161 (1945) (employer suit involving Fair Labor Standards Act); *Standard Oil Co.* v. *Agsalud*, 633 F.2d 760 (9th Cir. 1980), aff'd, 454 U.S. 801 (1981) (employer suit involving ERISA); *Arizona* v. *Atchison, T. & S. F. R.R.*, 656 F.2d 398 (9th Cir. 1981) (state's suit involving Railroad Revitalization and Regulatory Reform Act). There is even more reason to find federal jurisdiction when the defense to the proposed state cause of action is one of federal preemption. See *Conference of Federal Savings & Loan Ass'n* v. *Stein*, 604 F.2d 1256, 1259-1260 (9th Cir. 1979), aff'd mem., 445 U.S. 921 (1980); *North American Phillips Corp.* v. *Emery Air Freight Corp.*, 579 F.2d 229, 233-234 (2d Cir. 1978); *Stone & Webster Engineering Corp.* v. *Ilsley*, 3 Employee Ben. Cas. (BNA) 2141, 2144-2146 (2d Cir. Sept. 30, 1982), appeal pending, No. 82-1085. Cf. *Avco Corp.* v. *Int'l Ass'n of Machinists & Aerospace Workers*, 390 U.S. 557 (1968) (Section 301 of Labor Management Relations Act). But see *Illinois* v. *Kerr-McGee Chemical Corp.*, 677 F.2d 571, 577-578 (7th Cir. 1982), cert. denied, No. 82-386 (Nov. 29, 1982); *Home Federal Savings and Loan Ass'n* v. *Insurance Dep't*

ERISA-covered plan. Hence, absent other assets of the taxpayers upon which the state can levy, the state must await the periodic distribution by the plan of monies to the participants.

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of Iowa, 571 F.2d 423 (8th Cir. 1978). Indeed, in *Alessi* v. *Raybestos-Manhattan, Inc.*, *supra*, this Court reached the merits of the case without addressing any jurisdictional question where the plaintiffs sued under state law and defendants removed to federal court on the ground of the ERISA preemption provision. See 451 U.S. 504, 508 (1981), aff'g 616 F.2d 1238, 1241 (3d Cir. 1980).

Finally, we do not believe that this action is barred by the Tax Injunction Act, 28 U.S.C. 1341, because the court of appeals' declaratory judgment has the effect of restraining the state's collection of taxes. See *California* v. *Grace Brethren Church*, No. 81-31, (June 18, 1982). Such relief is appropriate if no "plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. 1341. Here, the available state remedies appear to be deficient under this standard. The fiduciaries, who requested a formal opinion from the federal agency responsible for enforcing ERISA's fiduciary requirements, were advised that they would violate the federal statute if they honored the state tax levy. Yet state law required the fiduciaries to pay the tax without resort to judicial proceedings or be personally liable and they had no discernible means of recouping the tax once paid. Cal. Rev. & Tax. Code §§ 18818-18820 (West Supp. 1982). Moreover, California courts are prohibited by statute from preventing the collection of any state income tax. *Id.* § 19081. See *National Carriers' Conference Committee* v. *Heffernan*, 440 F. Supp. 1280 (D. Conn. 1977). Cf. *Rosewell* v. *LaSalle National Bank*, 450 U.S. 503 (1981) (procedure requiring payment of tax and possible refund without interest in two years is "a plain, speedy and efficient remedy"); *Tully* v. *Griffin, Inc.*, 429 U.S. 68 (1976) (state declaratory judgment remedy that allows adjudication of constitutionality issue is plain, speedy and efficient). By contrast, Congress enacted ERISA to permit the resolution of such disputes by means of suits brought by fiduciaries exclusively in federal court. 29 U.S.C. 1132(a)(3); 1132(e)(1). See, *e.g.*, *General Motors Corp.* v. *Buha*, 623 F.2d 455 (6th Cir. 1980); *AT&T Co.* v. *Merry*, 592 F.2d 118 (2d Cir. 1979); *Local 212 IBEW Vacation Trust Fund* v. *Local 212 IBEW Credit Union*, 549 F. Supp. 1299 (S.D. Ohio 1982).

In these circumstances, a "common-sense accommodation of judgment to kaleidoscopic situations" (*Gully*, *supra*, 299 U.S. at 117) would support federal jurisdiction.

A. The California tax levy relates to an employee benefit plan within the meaning of Section 514(a) of ERISA

Section 514(a) of ERISA expressly preempts "any and all State laws" which "relate to any employee benefit plan," 29 U.S.C. 1144(a). The term "employee benefit plan" is defined to include both pension plans and welfare plans; a vacation plan is one species of ERISA-covered welfare plan. 29 U.S.C. (& Supp. V) 1002(1), (2) and (3). The statute broadly defines the terms "State law" and "State" to include all state action which "purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans." 29 U.S.C. 1144(c). The only statutory exceptions to this broad preemption principle are for state laws regulating insurance, banking, or securities, or generally applicable state criminal laws. 29 U.S.C. 1144(b)(2)(A) and (4). ERISA contains no savings provision for state tax laws, which are therefore preempted insofar as they relate to employee benefit plans.

Here, pursuant to § 18817 Cal. Rev. & Tax. Code (West 1970 & Supp. 1982), the state taxing authorities have sought to levy upon the Trust for unpaid taxes of plan participants. We submit that such action interferes with the purposes of both ERISA and this particular Trust and therefore "relates to" an ERISA-covered employee benefit plan within the meaning of Section 514(a). As we shall discuss in greater detail (*infra* pp. 17-21), Congress carefully formulated the preemption provision of ERISA to encompass any state laws affecting plans in any way. But even if ERISA preempted only state laws "regulating" plans, the California tax levy statute meets that criterion. It attempts to regulate the terms and conditions of a plan by imposing specific administrative duties on the Trust, with accompanying added costs. Moreover, the state law would override an express anti-alienation provision, contained in the trust

agreement, which ERISA requires the fiduciaries to honor. 29 U.S.C. (Supp. V) 1104(a)(1)(D).

Appellee Trust was established as a spendthrift trust for the accumulation and payment of vacation benefits. It contains several provisions barring alienation or garnishment of benefits, either voluntarily or by operation of law. These anti-alienation provisions, negotiated by the parties to the trust agreement and permitted under ERISA, cannot accomplish their purpose if the state is allowed to levy upon plan assets to satisfy the tax liabilities of participants.

In enacting ERISA, Congress declared that "the continued well-being and security of millions of employees and their dependents are directly affected by [employee benefit] plans * * * and it is therefore desirable in the interests of employees and their beneficiaries * * * that minimum standards be provided assuring the equitable character of such plans and their financial soundness." 29 U.S.C. 1001(a). Vacation plans, like other welfare benefit plans, promote the well-being of employees, and the integrity of all such plans was the congressional concern that prompted passage of the Act. There is no distinction under ERISA between vacation plans and any other employee welfare benefit plan. Such plans, defined in Section 3(1) of ERISA, may provide medical, surgical, hospital, sickness, accident, disability, death, unemployment or vacation benefits, or apprenticeshp and training programs, day care centers, scholarship funds, or prepaid legal services. As a result, if Section 514 were held to permit state garnishment or tax levies against vacation plans, such a decision could well be extended to expose the assets of other benefit plans to compulsory seizure by a host of creditors, both public and private, who seek to exercise their rights under state law.

Furthermore, garnishment of the Trust assets would directly conflict with Sections 403(c)(1) and 404(a)(1)(A) and (D) of ERISA, 29 U.S.C. (Supp. V) 1103(c)(1)

and 29 U.S.C. (& Supp. V) 1104(a)(1)(A) and (D). These provisions require fiduciaries to expend trust funds for the exclusive purpose of providing benefits and defraying reasonable administrative costs, and "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this [title]." 29 U.S.C. (& Supp. V) 1103(c)(1) and 1104(a)(1)(A) and (D). Payment of plan monies to the creditor of a beneficiary violates these ERISA restrictions, as well as the specific plan provisions in this Trust; and such payment could subject the trustees to personal liability for breach of fiduciary responsibility. See 29 U.S.C. (& Supp. V) 1109 and 1132. Congress preempted state laws under Section 514(a) precisely to free plans and their trustees from such conflicting legal duties.

California's tax levy statute, as applied to employee benefit plans, is analogous to the state laws preempted in *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), and in *Kramarsky* v. *Delta Airlines, Inc.*, 666 F.2d 21 (2d Cir. 1981), appeal pending, No. 81-1578 (argued Jan. 10, 1983). None of the three state laws at issue in *Alessi*, *Kramarsky*, and the instant case, was enacted solely to regulate employee benefit plans; instead, each purported to govern other subjects, *i.e.*, workers' compensation (*Alessi*), employment discrimination (*Kramarsky*), and tax collection (in the instant case). The courts held that this indirect application was immaterial; the state laws were preempted insofar as they related to employe benefit plans. In addition, each state law had the effect of eliminating from plans certain features permitted under federal law. In *Alessi*, the feature was integration provisions with workers' compensation. In *Kramarsky*, it was treatment of pregnancy differently from other disabilities. Here, it is anti-alienation provisions which insure that Trust monies will be expended only for the purposes established by

the parties to the Trust Agreement. As this Court observed in *Alessi*: [3]

> It is of no moment that New Jersey intrudes indirectly, through a workers' compensation law, rather than directly, through a statute called "pension regulations." ERISA makes clear that even indirect state action bearing on private pensions may encroach upon the area of exclusive federal concern.

451 U.S. at 525.

This Court also emphasized in *Alessi* that when a plan provision emerges from collective bargaining, as in the instant case, "the additional federal interest in precluding state interference with labor-management negotiations calls for pre-emption * * *." *Id.* at 525. "As a subject of collective bargaining, pension terms themselves become expressions of federal law, requiring preemption of intrusive state law." *Id.* at 526.

The only previously reported case addressing ERISA preemption of state tax laws supports the Secretary of Labor's interpretation in this case. In *National Carriers' Conference Committee* v. *Heffernan*, 454 F. Supp. 914

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[3] Prior to *Alessi* and *Kramarsky*, a series of decisions likewise supported a broad reading of the ERISA preemption provision. See, *e.g.*, *Hewlett-Packard Co.* v. *Barnes*, 571 F.2d 502 (9th Cir.), cert. denied, 439 U.S. 831 (1978) (preemption of California Knox-Keene Health Care Service Plan Act of 1975 as it relates to employee benefit plans); *Standard Oil Co.* v. *Agsalud*, 633 F.2d 760 (9th Cir. 1980), aff'd, 454 U.S. 801 (1981) (preemption of Hawaii Prepaid Health Care Act). Even those cases finding no preemption due to the express savings provision for state laws regulating insurance begin their analysis by recognizing that "federal preemption in the area of pensions and other employee benefit programs is virtually total." *Bell* v. *Employee Security Benefit Ass'n*, 437 F. Supp. 382, 387 (D. Kan. 1977); accord, *Wadsworth* v. *Whaland*, 562 F.2d 70, 75-77 (1st Cir. 1977), cert. denied, 435 U.S. 980 (1978).

Similarly, the state tax law in the instant case would operate to displace trust provisions Congress committed "to the discretion of pension plan designers." *Alessi* v. *Raybestos-Manhattan, Inc.*, *supra*, 451 U.S. at 525.

(D. Conn. 1978), the court held that Section 514(a) of ERISA preempted a Connecticut statute which required employee welfare benefit plans to pay an annual tax of 2.75% of the benefits paid to Connecticut residents. The court reasoned that the tax related to employee benefit plans and did not fall within any of the savings provisions, since "Congress has not excluded even general tax statutes from preemption." 454 F. Supp. at 916.[4] As the court further stated, in terms that apply equally to this case, "the Connecticut tax 'relates' to an ERISA-covered plan and is therefore within the plain meaning of the statute. Moreover, Congress rejected versions of the preemption provision limiting it to areas 'regulated' by ERISA in favor of more sweeping language." *Id.* at 917. Just as a state cannot deplete the assets of an ERISA-covered employee benefit plan by direct taxation, neither can it accomplish the same goal by levying upon the assets of such a plan to satisfy the tax liabilities of its participants. In both instances, the state tax laws sought to be enforced "relate to" plans within the meaning of Section 514—by imposing administrative obligations on plans, by taking funds that are held in trust for plan participants, and by interfering with the fiduciaries' obligations mandated by federal statute.

B. The legislative history of ERISA confirms Congress' intent to preempt state tax laws

The legislative history of ERISA confirms Congress' intent to preempt the field with respect to ERISA-covered employee benefit plans by superseding any and all state laws affecting such plans. The broad preemption language in Section 514 emerged from the Conference Committee, which deliberately rejected the narrower scope of preemption contained in the earlier House and Senate versions of the bill. The Conference Committee was con-

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[4] This conclusion was subsequently ratified by statutory amendment. See *infra* pp. 20-21.

fronted with two bills[5] which, with certain variations, took a common approach to the preemption of state laws. Under each of the earlier bills, federal preemption was limited to the substantive areas actually regulated under the legislation, and further limited to the type of plan (*i.e.*, welfare or pension) covered within any given area of the federal law.

But that selective approach to preemption was rejected. In his statement prior to Senate action on the Conference Committee bill, Senator Javits, a principal sponsor of the legislation, noted the concern of the conferees with respect to the scope of preemption found in both bills:

> Both the House and Senate bills provided for preemption of State law, but—with one major exception appearing in the House bill—defined the perimeters of preemption in relation to the areas regulated by the bill.
>
> Such a formulation raised the possibility of endless litigation over the validity of State action that might impinge on Federal regulation, as well as opening the door to multiple and potentially conflicting State laws hastily contrived to deal with some particular aspect of private welfare or pension benefit plans not clearly connected to the Federal regulatory scheme.
>
> Although the desirability of further regulation—at either the State or Federal level—undoubtedly warrants further attention, on balance, the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs.

120 Cong. Rec. 29942 (1974).

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[5] Section 514 of H.R. 2, 93d Cong., 2d Sess. (1974), as passed by the House of Representatives on February 28, 1974, 120 Cong. Rec. 4742, 4781; Section 699 of H.R. 2, as passed by the Senate on March 4, 1974, 120 Cong. Rec. 5002, 5011.

Thus, to assure uniform regulation of plans and to eliminate the application of inconsistent state laws affecting their operation, Congress abandoned the earlier approach of limiting preemption to subject matter actually regulated, and substituted in its place an extremely broad preemption provision. The crucial change made by the Conference Committee was the preemption of state laws relating to *plans* covered by the Act, as opposed to *subjects* covered by the Act. Thus, appellant errs in arguing (Appellant's Br. 20) that Congress did not intend to preempt state laws merely "affecting" ERISA plans. On the contrary, as Congressman Dent described the conferees' intent to the House of Representatives, "the provisions of Section 514 would reach any rule, regulation, practice, or decision of any State * * * which would *affect* any employee benefit plan" covered by ERISA. 120 Cong. Rec. 29197 (1974) (emphasis added).

The only areas which Congress preserved for state regulation are those specifically enumerated in Section 514(b)(2)(A) and (4): laws regulating insurance, banking, or securities, or any generally applicable criminal law of a state.[6] State tax laws, however, are *not* included in this list of state laws saved from preemption. In fact, Congress declined to enact a savings provision for state tax laws even after such a provision was recommended by the Secretaries of Labor and Treasury to the Conference Committee considering ERISA. The proposed language declared:

> Notwithstanding the provisions of this section, a State shall have the authority to prescribe rules and regulations governing the tax qualification and taxation of contributions, distributions or income, of an employee pension plan * * *.

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[6] Section 4(b)(3) of the Act, 29 U.S.C. 1003(b)(3), also excludes from ERISA coverage plans that are maintained "solely" to comply with state unemployment, workers' compensation, or disability insurance laws.

Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., 3 *Legislative History of the Employee Retirement Income Security Act of 1974*, App. 5147 (Comm. Print 1976). As the court explained in *National Carriers Conference Committee* v. *Heffernan*, *supra*, 454 F. Supp. at 917—

> Thus, in the face of a formal request to exempt state taxation from the narrow preemption provisions contained in the House and Senate versions of the bill, Congress not only declined the request but adopted far broader language. Although the administration proposal was directed only at state taxation of pension plans, it fairly alerted Congress to the issue of taxing welfare plans as well. Thus Congress, alerted to the taxation issue, chose not to exempt the taxing power from ERISA's broad preemption of state law.

Since the enactment of ERISA in 1974, congressional committees have held numerous hearings,[7] and various bills have been introduced to alter the scope of ERISA preemption.[8] The *Heffernan* decision was neither criticized nor overruled in Congress and, in fact, was cited with approval in 1979 by Senator Javits, one of the original co-sponsors of ERISA in the Senate and an architect of its broad preemption language. 125 Cong. Rec. 947 (1979). Not until 1983 did Congress act to amend ERISA's preemption language at all, and then it specifically endorsed the preemption of state tax laws under Section 514(a).

That amendment, Section 301 of Pub. L. No. 97-473, 96 Stat. 2611, signed on January 14, 1983, provides in pertinent part:

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[7] See, *e.g.*, *Oversight of ERISA, 1977: Hearings on S. 2125 Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 561-575, 650-691 (1977).

[8] See, *e.g.*, S. 209, 96th Cong., 1st Sess. (1979); 125 Cong. Rec. 937 (1979).

(a) EXEMPTION FROM PREEMPTION.—Section 514(b) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1144(b)) is amended by adding at the end thereof the following new paragraph:

"(5)(A) Except as provided in subparagraph (B), subsection (a) shall not apply to the Hawaii Prepaid Health Care Act (Haw. Rev. Stat. §§ 393-1 through 393-51).

(B): *Nothing in subparagraph (A) shall be construed to exempt from subsection (a)—*

(i) *any State tax law relating to employee benefit plans* * * * (emphasis added).

The purpose of this amendment was to exempt Hawaii's experimental, mandatory health benefit statute from the preemptive reach of Section 514(a), but not to exempt any state tax law relating to employee benefit plans. Indeed, the Conference Report specified that the latter category of state laws would continue to be preempted.[9] This reconfirms that Congress intended to preempt all state tax laws insofar as they relate to employee benefit plans.

C. The statutory preemption of state laws relating to pension plans is likewise applicable to employee welfare benefit plans

As we have shown, the preemption rule of Section 514 applies to both pension and welfare plans. Appellant, however, contends (Br. 23-25) that ERISA preempts only garnishment of pension plans. It relies on Section 206(d)(1) of the Act, which provides that "[e]ach pension plan shall provide that benefits provided under the

[9] The Conference Report explained as follows: "The provision generally exempts the Hawaii Prepaid Health Care Act from preemption by ERISA. Under the provision, however, preemption is continued with respect to * * * any State tax law relating to employee benefit plans * * *." H.R. Rep. No. 97-984, 97th Cong., 2d Sess. 18 (1982).

plan may not be assigned or alienated." 29 U.S.C. 1056(d)(1). The identical provision in Section 401(a)(13) of the Internal Revenue Code of 1954 (26 U.S.C.) has been interpreted in a Treasury Regulation to prohibit both voluntary assignments and alienation of benefits by participants, and attachment, garnishment or levy by operation of law. Treasury Regulations (1954 Code), 26 C.F.R. 1.401(a)-13(b)(1). This interpretation is supported by the legislative history, and most courts have held that private creditors may not garnish pension benefits under Section 206(d)(1) of ERISA.[10]

Appellant argues (Br. 32-33) that the specific anti-alienation provision of Section 206(d)(1) of ERISA for pension plans demonstrates that there is no similar restriction for welfare plans. But that fact does not undercut our submission that Section 514 preempts state law regarding garnishment of assets of any employee benefit plans. The legislative history shows that early versions of the anti-alienation provision were included in bills reported out of both House and Senate committees, well before the Conference Committee adopted the broad preemption language enacted in Section 514.[11] These anti-alienation provisions were designed to ensure that vested pension benefits would not be lost. S. Rep. No. 93-127, 93d Cong., 1st Sess. 39 (1973).

Section 514, in contrast, preempts state laws relating to both pension and welfare plans. As a result, Section

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[10] *General Motors Corp.* v. *Buha*, 623 F.2d 455 (6th Cir. 1980); *Commercial Mortgage Ins. Inc.* v. *Citizens Nat'l Bank*, 526 F. Supp. 510 (N.D. Tex. 1981); *Peoples Finance Co.* v. *Saffold*, 83 Ill. App. 3d 120, 403 N.E.2d 765 (1980); *Helmsley-Spear, Inc* v. *Winter*, 74 A.D.2d 195, 426 N.Y.S.2d 778 (1980); contra, *Nat'l Bank of North America* v. *IBEW Local #3*, 69 A.D.2d 679, 419 N.Y.S.2d 127 (1979), appeal dismissed as moot, 48 N.Y.2d 752, 397 N.E.2d 1333, 422 N.Y.S.2d 666 (1979).

[11] See S. 4 as reported by the Senate Committee on Labor and Public Welfare, S. Rep. No. 93-127, 93d Cong., 1st Sess. 123-124 (1973), and H.R. 12481 as reported by the House Committee on Ways and Means, H.R. Rep. No. 93-779, 93d Cong., 2d Sess. 77-78 (1974).

514(a) prohibits tax levies and garnishments on assets of plans by operation of law, but does not reach voluntary assignments by plan participants. This means voluntary assignments of welfare plan benefits are not prohibited by ERISA per se, although they may be contrary to plan provisions which fiduciaries are bound to follow under Section 404(a)(1)(D) of ERISA.[12] Accordingly, Section 206(d)(1) does not abrogate in any way the broad preemptive effect of Section 514 for both pension and welfare plans.[13]

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[12] The distinction between voluntary and involuntary assignment of welfare benefits under ERISA is illustrated by a Department of Labor Interpretive Bulletin permitting voluntary assignment of vacation plan benefits under certain conditions. 29 C.F.R. 2509.78-1. Such payments are permissible—

> * * * if the arrangement pursuant to which payments are made does not constitute a prohibited transaction under ERISA and:
>
> (1) The plan documents expressly state that benefits payable under the plan to a participant or beneficiary may, at the direction of the participant or beneficiary, be paid to a third party rather than to the participant or beneficiary;
>
> (2) The participant or beneficiary directs in writing that the plan trustee(s) shall pay a named third party all or a specified portion of the sum of money which would otherwise be paid under the plan for him or her; and
>
> (3) A payment is made to a third party only when or after the money would otherwise be payable to the plan participant or beneficiary.

None of these three conditions is present in this case because (1) plan documents prohibit, rather than permit, such an assignment; (2) there is no evidence suggesting that the three affected participants directed the Trust in writing to pay their tax bills; and (3) the Tax Board is not purporting to limit its garnishment claims to those times when vacation benefits would otherwise be payable to plan participants. See *Marshall* v. *Davis*, 517 F. Supp. 551 (W.D. Mich. 198[illegible]) (upholding 29 C.F.R. 2509.78-1); cf. *Monsanto Co.* v. *Ford*, 534 F. Supp. 51 (E.D. Mo. 1981) (pension benefits cannot be garnished for family support when not in "pay status").

[13] For the same reason, the fact that Congress has included anti-alienation provisions in other federal pension statutes does

Electrical Workers Credit Union v. *IBEW NECA Holiday Trust Fund*, 583 S.W.2d 154 (Mo. 1979), upon which appellant relies (Br. 31-32), is no longer a viable precedent in light of this Court's decision in *Alessi*. There, the Holiday Trust at issue before the Missouri courts was a vacation plan similar in structure and purpose to the Trust in the instant case, and contained a similar "spendthrift" provision barring assignment to or garnishment by any creditor of a beneficiary. Although the Missouri Supreme Court acknowledged that garnishment of pension benefits would be barred by Section 206(d)(1), it concluded that garnishment of a vacation plan's assets was not preempted by Section 514. In so holding, the court noted that ERISA's regulation of welfare plans is much less comprehensive than its regulation of pension plans, and that the anti-alienation provision in Section 206(d)(1) applies solely to pension plans. Accordingly, the Missouri court characterized the state garnishment law as falling within the "narrow category of [state] laws which affect employee benefit plans but * * * do not relate to them within the meaning of § 1144(a)." *Electrical Workers Credit Union*, *supra*, 583 S.W.2d at 158. See also *Local 212 IBEW Vacation Trust Fund* v. *Local 212 IBEW Credit Union*, 549 F. Supp. 1299, 1302 (S.D. Ohio 1982) (following the dissent in the court below).

But this analysis, previously advanced in *Gast* v. *Oregon*, 36 Or. App. 441, 585 P.2d 12 (1978), upon which the Missouri court relied, has subsequently been discredited by this Court in *Alessi* and by the Second Circuit in *Kramarsky*. Section 514 does not distinguish between the two categories. Although Congress left more to the discretion of plan designers in the area of welfare plans, it consciously chose to displace state laws relating

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not, as appellant contends (Br. 22-23), suggest that state garnishment laws apply to ERISA welfare benefit plans. Cf. *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572 (1979) (Railroad Retirement Act of 1974).

to both pension and welfare plans, in order to achieve uniformity and encourage voluntary participation. There is accordingly no basis for applying the preemption provision differently for pension and welfare plans merely because Congress chose to regulate pension plans more comprehensively.

Finally, appellant (Br. 26-28) relies on a line of cases which have found a limited implied exception to ERISA's preemption and pension anti-alienation provisions to permit garnishment of plan benefits to satisfy family support and community property obligations contained in a state divorce decree. *AT & T Co.* v. *Merry*, 592 F.2d 118 (2d Cir. 1979); *Stone* v. *Stone*, 450 F. Supp. 919 (N.D. Cal. 1978), aff'd, 632 F.2d 740 (9th Cir. 1980), cert. denied, 453 U.S. 922 (1981); *Carpenters Pension Trust* v. *Kronschnabel*, 632 F.2d 745 (9th Cir. 1980), cert. denied, 453 U.S. 922 (1981). See also *In re the Marriage of Campa*, 89 Cal. App. 3d 113, 152 Cal. Rptr. 362 (1979), appeal dismissed, 444 U.S. 1028 (1980) (state marriage dissolution decree requiring trustees of a pension plan to divide payments between employee and ex-spouse not preempted). Unlike the tax levy in the instant case, however, the implied exception for family support obligations is consistent with the purposes of ERISA. "Members of the families of employees are included in the class which ERISA protects," a factor which distinguishes the claims of non-employee spouses from those of business or other creditors. *Stone* v. *Stone*, *supra*, 450 F. Supp. at 926. As Congress expressly declared in enacting ERISA, "the continued well-being and security of millions of employees *and their dependents* are directly affected by the plans." Section 2(a), 29 U.S.C. 1001(a) (emphasis added). ERISA was designed to protect the interests of employees and their families. For purposes of ERISA preemption, the claims of state tax authorities are no different from those of any other creditors; both are outside the class of interests ERISA was enacted to protect. Accordingly, there is no basis for an

implied exception for state tax collection, especially in light of Congress' explicit reference in the recent amendment to "any State tax law relating to employee benefit plans" as within the scope of the preemption provision (see *supra* p. 21).[14]

D. The federal preemption of state tax levies upon the assets of ERISA-covered welfare benefit plans does not violate the Tenth Amendment

Finally, for the first time in this litigation, appellant argues (Br. 35-37) that interpreting Section 514 of ERISA to preempt state tax levies upon employee welfare benefit plans violates the Tenth Amendment because it would interfere with the state's power to assess and uniformiy collect its taxes. In support of its contention, appellant relies upon *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

But as this Court pointed out in *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 277-278 (1981) (emphasis in original; citations omitted), and reaffirmed in *EEOC* v. *Wyoming*, No. 81-554 (Mar. 2, 1983), slip op. at 9—

> [I]n order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of *National League of Cities* must satisfy *each* of three requirements. First, there must be a showing that the challenged statute regulates the 'States as States.' Second, the federal regulation must address matters that are undisputably 'at-

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[14] Appellant correctly points out (Br. 15) that the Internal Revenue Service is allowed to levy against plan assets under Section 6334(a) of the Internal Revenue Code of 1954 (26 U.S.C.). See Mot. to Dis. App. 26-27. This is not, however, inconsistent with our view that state tax levies are prohibited. While ERISA preempts all state statutes, it expressly preserves all federal statutes. See Section 514(d), 29 U.S.C. 1144(d).

> tribute[s] of state sovereignty.' And third, it must be apparent that the States' compliance with the federal law would directly impair their ability 'to structure integral operations in areas of traditional governmental functions.'

Here it is doubtful that appellant can satisfy any of the requirements. First, the preemption of state tax laws does not regulate the states as states, but simply manifests Congress' intention to bar all garnishment by creditors, both public and private, of ERISA-covered pension and employee welfare benefit plans. For the same reason, the preemption provision does not address matters that are undisputably an attribute of state sovereignty. Rather, it addresses the state in its capacity of creditor. Finally, the preemption does not impair the ability of the state to perform traditional governmental functions. Although appellant argues that the construction of ERISA adopted by the court below would impair its ability to collect taxes, there is nothing on the record to support that assertion. Indeed, all the decision below holds is that the state cannot levy upon the assets of an employee welfare benefit plan. There is nothing in the decision that would prevent the state from exercising its levy power against other assets of delinquent participants or which excuses the plan participants from their legal obligation under the state tax law. Accordingly, enforcement of the state's tax laws is not impaired.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Title: Franchise Tax Board of the State of California, Appellant
v.
Construction Laborers Vacation Trust for Southern California, et al.

Court: United States Court of Appeals for the Ninth Circuit

Counsel for appellant: Kitching, Patti S.

Counsel for appellee: Watson, James P.

Entry	Date	Note	Proceedings and Orders
1	Oct 18 1982	G	Statement as to jurisdiction filed.
2	Nov 18 1982		Motion of appellees Constr. Laborers Vacation Trust, et al. to dismiss or affirm filed.
3	Nov 23 1982		DISTRIBUTED. December 10, 1982
4	Dec 13 1982		Further consideration of the question of jurisdiction is POSTPONED to the hearing of the case on the merits.
			**********
6	Jan 14 1983		Order extending time to file brief of appellant on the merits until February 10, 1983.
7	Jan 29 1983		Joint appendix filed.
8	Feb 14 1983		Brief amicus curiae of State of Connecticut, et al. filed.
9	Feb 15 1983		Brief of appellant Franchise Tax Bd. of Ca filed.
10	Feb 16 1983		Brief amicus curiae of Multistate Tax Corp. filed.
14	Feb 23 1983		Order extending time to file brief of appellee on the merits until March 18, 1983.
15	Mar 17 1983		Record filed.
16	Mar 17 1983		Certified original record & C.A. proceedings received.
17	Mar 17 1983		Brief amicus curiae of ERISA Industry Comm. filed.
18	Mar 18 1983		Brief of appellee Constr. Laborers Vacation Tr. filed.
19	Mar 18 1983		Brief amicus curiae of United States filed.
20	Mar 21 1983	G	Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae filed.
21	Mar 22 1983		Brief amicus curiae of Boards of Trustees, et al. filed.
22	Mar 24 1983		SET FOR ARGUMENT. Tuesday, April 19, 1983. (2nd case) 1 hour
23	Mar 24 1983		CIRCULATED.
24	Mar 28 1983		Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief as amicus curiae GRANTED.
25	Apr 12 1983	X	Reply brief of appellant Franchise Tax Bd. of Ca filed.
26	Apr 19 1983		ARGUED.